

Justice of the Peace

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Again in the UK funds are being made available to undertake a study of the needs of the red squirrel, our native species. The numbers of red squirrels are steadily declining and the aim is to ensure that their remaining areas provide the best possible conditions for their future survival.

As well as working in the UK the Trust has many projects in hand all over the world. The Turtle Rescue Programme in Costa Rica relies heavily on us for funds; soil analysis work in Kenya is leading to dietary supplements for rhinos and water buck suffering from mineral deficiencies; a turtle reserve has been set up in Sri Lanka; money has been donated to ensure bats have safe places in which to hibernate and preliminary work has been done on Mafia Island off Tanzania with a view to setting up a Marine Park there.

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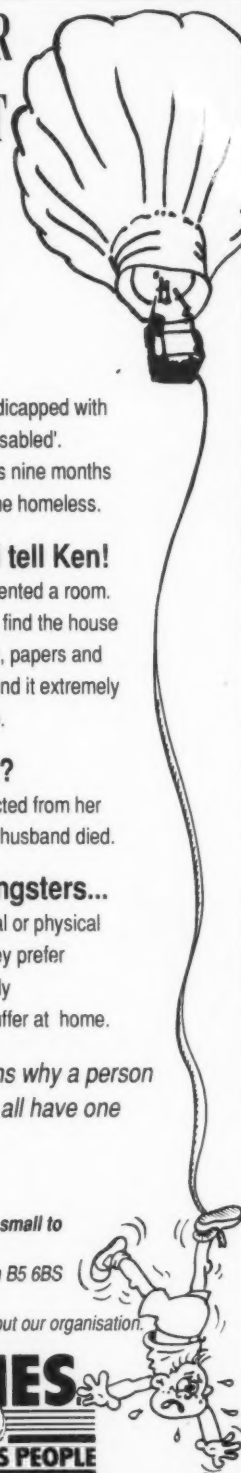
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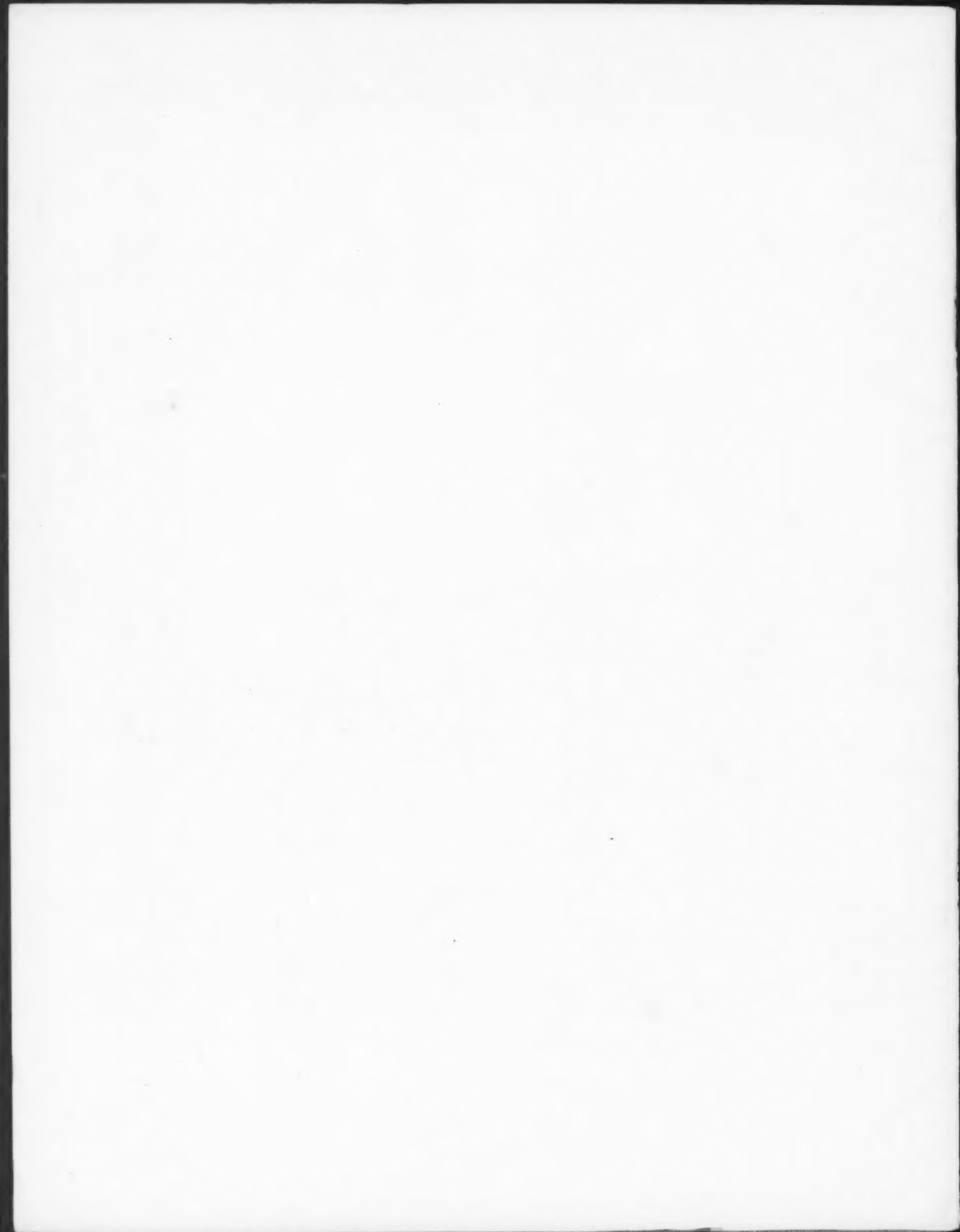
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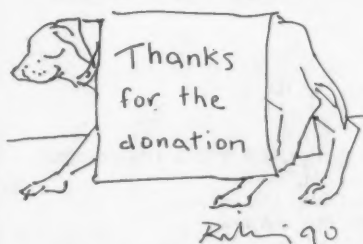
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APPEALS

Appeals - meaning of "person aggrieved".

Licensing - hackney carriages - whether a local authority which revokes licences is "a person aggrieved" by a decision of a magistrates' court to allow an appeal against revocation - Local Government (Miscellaneous Provisions) Act 1976.

The appellant held licences as the owner and driver of a hackney carriage. The respondent local authority revoked both licences. The appellant appealed to the magistrates' court, which allowed his appeal, and ordered the local authority to pay him £100 by way of costs. The local authority appealed to the Crown Court, which allowed the appeal. The appellant then appealed by way of case stated to the High Court, where the issue was confined to the question of whether or not the local authority had had any right of appeal to the Crown Court against the adverse decision of the magistrates' court. The answer to this question depended on whether or not the local authority was "a person aggrieved" by the magistrates' court's decision.

In the High Court, Simon Brown, J. felt constrained by a line of authority, beginning with *R. v. London Quarter Sessions, ex parte Westminster Corporation* (1951) 115 J.P. 350; [1951] 2 K.B. 508, to dismiss the appeal on the limited ground that the local authority was "a person aggrieved" because of the order for costs, although if there had been no such order, his decision would have been that the local authority was not "a person aggrieved".

On appeal to the Court of Appeal.

Held (dismissing the appeal): (1) In order to conclude that a party to proceedings is "a person aggrieved" by the decision in those proceedings, it is sufficient that the decision is against that party, and it is not necessary also to show that the decision places a burden on him; therefore (2) the local authority was "a person aggrieved", irrespective of the order for costs, with the result that it had a right of appeal to the Crown Court; furthermore (3) the case of *R. v. London Quarter Sessions, ex parte Westminster Corporation* was wrongly decided; therefore (4) all cases in which that decision has been followed should be treated with considerable reserve; and (5) although whether or not those cases following *R. v. London Quarter Sessions, ex parte Westminster Corporation* should be considered to have been wrongly decided must depend on the individual circumstances of each case, as a general principle, and except for criminal cases which come within a special category, and other cases where the decision against the local authority can be regarded as being an acquittal, the normal result of re-examining those cases should be that a public authority is entitled to be treated as "a person aggrieved" where it is subject to an adverse decision in an area where it is required to perform public duties.

Appeal against a decision of Simon Brown, J., sitting in the Queen's Bench Division of the High Court.

Cook v. Southend Borough Council C.A.

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BYELAWS

Byelaws - whether byelaws made under the Local Government Act 1933 are preserved by the Local Government Act 1972.

Although s.272(2) of the Local Government Act 1972 is obscure and difficult to construe, its true effect includes the preservation of byelaws which were made under the Local Government Act 1933, notwithstanding the repeal of the whole of that Act by the Act of 1972.

Appeal by way of case stated against a decision of a stipendiary magistrate sitting at Wells Street magistrates' court.

Director of Public Prosecutions v. Jackson and Another Q.B.D.

967

CARAVANS

Caravans - validity of condition on site licence requiring removal of caravans for part of the year - Caravan Sites and Control of Development Act 1960.

Where land enjoys the benefit of unconditional planning permission for use as a caravan site throughout the year, a local authority which issues a site licence under the Caravan Sites and Control of Development Act 1960 may lawfully impose on that licence a condition restricting occupation of the caravans to part of the year, but it cannot lawfully impose a condition requiring the removal of the caravans during the period in which occupation is prohibited.

Appeal against a decision of a Divisional Court of the Queen's Bench Division of the High Court.

Babbage v. North Norfolk District Council C.A.

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CHILDREN AND YOUNG PERSONS

Juvenile - arrested and charged with offence - custody officer refuses bail - local authority propose to place juvenile in insecure hostel - whether custody officer justified in certifying that it was impracticable for the juvenile to be taken into care by the local authority.

By s.38(1) of the Police and Criminal Evidence Act 1984 where a person is arrested (otherwise than on a warrant endorsed with bail) and charged with an offence, the custody officer is required to release him on bail unless certain specified conditions are satisfied. If the person is not released on bail, s.38(2) enables the custody officer to authorize that he be kept in police detention. Section 38(1) and (2) apply to juveniles, and s.38(6) further provides:

"Where a custody officer authorizes an arrested juvenile to be kept in police detention under subs.(1) above, the custody officer shall, unless he certifies that it is impracticable to do so, make arrangements for the arrested juvenile to be taken into the care of the local authority and detained by the authority ..."

The applicant, who was, at the relevant time, a juvenile, was in the care of the local authority and living continuously at a local authority hostel. In 1988 and 1989 he was found guilty of a number of offences. In September 1989 (when he was 16½) he was arrested at 2.46 a.m. for theft from motor vehicles. He was interviewed and charged later the same day. The custody officer decided to refuse bail because there was a risk he would go and see another youth who it was suspected had received property from a burglary which the applicant had admitted committing. A social worker informed the custody officer that the juvenile could return to the local authority hostel. The custody officer certified that the local authority were unable to make arrangements for the juvenile to be taken into care and authorized the juvenile to be kept in police detention.

The juvenile applied for judicial review. It was argued on his behalf that s.38(6) left all questions as to the suitability of accommodation to the local authority. Provided the local authority believed they could provide accommodation which they thought was suitable, the custody officer could not properly conclude that it was impracticable for the necessary arrangements to be made, nor could he refuse to transfer the juvenile to the care of the local authority. It was further argued that the relevant decision as to the detention was left solely to the local authority by the "care" legislation. By s.73(1)(b) of the Child Care Act 1980 the local authority was required to make provision in a community home for children detained by them in pursuance of s.38(6) of the 1984 Act. By s.21A of the 1980 Act the circumstances in which a child could be detained in secure accommodation were prescribed. Those circumstances did not include those where the child in question might cause loss or damage to property or interfere with the administration of justice.

Held - refusing the application: The certificate issued by the custody officer was a reference not to the fact that the local authority was unwilling or unable to take the juvenile into care, but that the arrangements proposed were not regarded by the custody officer as providing the necessary security. The decision of the custody officer to refuse bail was sensible and realistic. If the argument on behalf of the juvenile was accepted, and the local authority returned him to the insecure hostel, the practical effect would have been tantamount to the grant of bail. It was the decision of the custody officer, not the local authority, to detain the juvenile rather than release him on bail. The fact that the "care" legislation did not contain any specific provision to enable local authorities to detain juveniles in secure accommodation did not provide any real assistance with the proper construction of s.38(6) of the 1984 Act and, in particular, the relative responsibilities of the custody officer and the local authority. The wording of that provision was clear. The custody officer who had decided to detain the juvenile must do everything practicable to see that the place of detention was local authority accommodation and not the police station. The local authority was equally obliged to do what it could to provide accommodation which would enable the juvenile to be accommodated outside the police station. However, if

the only accommodation apparently available for the detention of the juvenile would be insufficient to avoid the very consequences which led to the original decision to refuse bail, the custody officer was entitled to reach the conclusion that proper arrangements for the care and detention of the juvenile by the local authority outside the police station were impracticable. In the present case, the custody officer was entitled to reach the conclusion that the proposed arrangement that the juvenile should be returned to the hostel at which he was living was not an adequate form of "detention" and, in the absence of an alternative proposal, that it was "impracticable" for necessary arrangements for his transfer to the care of and detention by the local authority to be made. He was, therefore, entitled to refuse to transfer the juvenile.

R. v. Chief Constable of Cambridgeshire, ex parte Michel Q.B.D.

535

CONSUMER PROTECTION

Toy safety - death of child following swallowing of part of new toy contained in chocolate egg - suspension notice issued by trading standards - whether suspension notice should be quashed - s.14 Consumer Protection Act 1987.

The applicants made chocolate eggs containing plastic kits which can be made into toys. On November 5, 1989, a month after a new toy had been introduced a three year old girl swallowed one of the feet of the toy and choked to death. There was much press comment about the incident. On November 8, 1989, the Birmingham Trading Standards Department issued a suspension notice under s.14 of the Consumer Protection Act 1987 prohibiting the applicants for six months from that date from supplying eggs containing the toy in question. The notice asserted breaches of reg.9 of the Toys (Safety) Regulations 1974 and of the general safety requirement in s.10 of the 1987 Act. This followed investigations by an officer of the authority, details of which are set out in his affidavit, contained in the judgment. On November 7, the officer spoke to a representative of the applicants and arranged a meeting for November 9. Ferrero for their part prepared a draft letter containing an undertaking to ensure that supplies ceased by November 18. On November 17, after a meeting the council wrote refusing to lift the notice but by this time the council had been advised that there was no breach of reg.9, although the toy probably infringed the new regulations which were not then in force. Despite several further attempts by the solicitors for the applicants, the council refused to lift the notice, referring to the right of the applicant to challenge the notice under s.15 of the 1987 Act before a magistrates' court. The applicants sought to challenge the issue of the notice on four grounds, namely lack of jurisdiction, taking into account irrelevant and failure to have regard to relevant considerations, unfairness and irrationality.

Held: (1) That although there was no apparent breach of para.9 of the 1974 regulations, there was no reason why there could still not be a breach of the general safety requirement under s.10, and on the evidence there appeared to be reasonable grounds for believing a breach of this general duty;

(2) given the apparent failure of the authority to consider the relevant British Standard, and their consideration of the then prospective regulations there was clearly evidence that the authority had taken into account an irrelevant consideration and had failed to take into account relevant matters;

(3) as this was not a situation of great urgency, given the huge number of eggs sold over the years containing parts which were detachable, there was a duty to consult with the company's representatives. As this had not been done, this was procedural impropriety on the part of the authority;

(4) the court would exercise its discretion in favour of the applicants, notwithstanding the availability of the alternative s.15 remedy. The authority had acted irrationally in not accepting the proposed undertaking, giving it as it did precisely what they achieved by means of the suspension notice. The alternative remedy in this context would not have allowed the applicants to air their complaints on substantial matters as discussed above which were of a public law nature.

There would be an order for costs in favour of the applicants.

R. v. Birmingham City Council, ex parte Ferrero Ltd. Q.B.D.

661

CONTROL OF POLLUTION

Control of pollution - noise nuisance - correct date for magistrates to take for the purpose of deciding whether an abatement notice should be upheld - s.58, Control of Pollution Act 1974 and reg.4, Control of Noise (Appeals) Regulations 1975.

Where an abatement notice has been served under s.58 of the Control of Pollution Act 1974 in respect of an alleged noise nuisance, and the recipient of the notice appeals to the magistrates' court, the question of whether the notice should be upheld must be determined by reference to the facts as they are at the date of the hearing by the magistrates' court, and not as they were at the date of the service of the notice.

Appeal by way of case stated.

Johnsons News of London v. Ealing London Borough Council Q.B.D.

33

Control of pollution - whether the usefulness of material prevents it from being classified as "waste" - s.30, Control of Pollution Act 1974.

A quantity of industrial waste had been used for many years as a hardstanding for storage purposes. The waste was then removed, and sorted into various categories. One category was used as infill material on another site, which was liable to subsidence, but in respect of which there was no waste disposal licence. The magistrates concluded that the usefulness of the material on the infill site precluded its classification as "waste" for the purposes of the Control of Pollution Act 1974, and accordingly they dismissed a number of informations based on the unauthorized deposit of controlled waste.

On appeal by way of case stated to the Queen's Bench Division of the High Court,

Held (allowing the appeal): The material in question had been "waste" for the purposes of the 1974 Act when it was removed from the original site, and its character was not subsequently changed either by its being sorted into different categories, or by its usefulness for infill purposes.

Appeal by way of case stated against the dismissal of informations by magistrates sitting at Sittingbourne.

Kent County Council v. Queenborough Rolling Mill Co. Ltd. Q.B.D.

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CORONERS

Coroners' law - s.6 Coroners Act 1887 - judicial review - standard of proof - unlawful killing - coroner's directions - stare decisis.

The deceased died on February 20, 1987 from asphyxiation as a result of compression of the neck while involved in a struggle with two policemen who were attempting to arrest him. The coroner gave a direction to the jury that the standard of proof required for a finding of unlawful killing was satisfaction "beyond all reasonable doubt". The coroner also gave directions both as to manslaughter by a deliberate unlawful act and manslaughter by a reckless or grossly negligent act. A verdict of death by misadventure was returned.

The brother of the deceased challenged the verdict by way of judicial review, seeking an order of certiorari to quash the verdict and mandamus requiring a new inquest to be held before another coroner. The brother alleged:

1. That the proper standard of proof should have been the balance of probabilities.
2. That the coroner had muddled the jury with his directions in that he had not made clear the elements required for a finding of unlawful killing and had confused the elements of manslaughter by a deliberate act with those of manslaughter by recklessness or gross negligence.

Held: 1. The standard of proof to be applied by a coroner's jury in considering a verdict of unlawful killing remains "beyond a reasonable doubt". *R. v. West London Coroner, ex parte Gray* is binding as court not convinced the decision was wrong.

2. On the facts of this case, any muddling in the coroner's directions between manslaughter by an unlawful act and manslaughter by recklessness or gross negligence would not have affected the jury's verdict as the factual issue was the same.

3. On judicial review the test to be applied is not simply whether there is an error of law, but whether that error has or may result in a wrong verdict being entered.

Obiter: 1. Following *R. v. Greater Manchester Coroner, ex parte Tal*, the court could depart from its previous decision if convinced it was plainly wrong.

2. When unlawful killing by neglect or lack of care clearly does not apply, it is better that the coroner not deal with it at all in his directions.

Cases cited in judgment:

- R. v. West London Coroner, ex parte Gray* [1987] 2 All E.R. 129.
R. v. City of London Coroner, ex parte Barber [1975] 3 All E.R. 538.
R. v. Greater Manchester Coroner, ex parte Tal [1987] 3 All E.R. 240.
R. v. Surrey Coroner, ex parte Campbell [1982] 2 All E.R. 545.
R. v. Home Secretary, ex parte Khawaja [1984] A.C. 74.

R. v. Coroner for Wolverhampton, ex parte Desmond Anthony McCurbin Q.B.D.

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Coroners' law - grounds under s.13 Coroners Act 1988 - insufficiency of inquiry - new facts or evidence - whether new inquest ought to be held - costs.

The deceased, a 16 year old boy, had been found dead on a farm. Nearby, on the ground, were aluminium pipes up to 30ft long and overhead were high tension electricity conductors.

At the inquest the pathologist gave the cause of death as cardiac arrest due to electrocution. Three experts who gave evidence deposed in varying strengths of conviction and had based their evidence upon varying findings of a physical nature to the pipes or cables.

The employing firm were prosecuted under the Health and Safety Regulations. They mounted a vigorous defence and brought two experts who, having examined the pipes apparently with greater sophistication, deposed as to the absence of signs of electrical contact which would have been expected. Their pathologist enumerated possible causes of cardiac arrest in a 16 year old boy other than electrocution. The magistrate dismissed the information laid against the company.

The applicant brought the action under s.13 Coroners Act 1988. One of the grounds was "insufficiency of inquiry" but in the event this ground was not pressed.

Held: 1. Where the coroner conducts the inquest with thoroughness and expert help to assist the jury it cannot be considered "insufficiency of inquiry" merely because other experts disagree.

2. It may not be necessary or desirable in the interest of justice that another inquest should be held merely because later evidence conflicts with evidence already heard.

3. Where the coroner is represented costs may be awarded to him.

Per Farquharson, L.J.: It is quite proper to direct the jury upon the criminal standard of proof in considering a choice of accident, misadventure or open verdict.

R. v. H.M. Coroner for Wiltshire, ex parte Geoffrey Taylor Q.B.D.

933

CRIMINAL LAW

Abuse of process of the court arising from substantial delay in prosecution following delay in police investigation.

On August 12, 1987, justices declined to hear informations laid on behalf of the Director of Public Prosecutions against two police constables alleging that they had assaulted the complainant on October 17, 1985, on the ground that the proceedings were an abuse of the process of the court. The complainant alleged that in the course of his being arrested for being in possession of a controlled drug he was assaulted by "a uniformed officer". There were a number of police officers, both uniformed and in plain clothes, present at the time. The complainant made a formal complaint three days later and the matter was reported to the Police Complaints Authority, whose investigating officer informed him that the investigation of the complaint would be suspended until the criminal proceedings in respect of the drugs offence were completed. Following his acquittal at the Crown Court in May 1986 he was re-arrested for another offence in respect of which he was placed on probation on July 24, 1986. Inquiries by the investigating officer into the alleged assault did not begin in earnest until after November 18, when the complainant made a written statement of complaint and the first indication given to the two defendants about that matter was on January 7, 1987 when they were told they were to be interviewed, but it was not until the following month that they were informed of its precise nature, i.e. 16 months after the alleged assault.

When the matter came before the magistrates' court on June 17, 1987, the defendants pleaded not guilty and the case was adjourned until August 12 when submissions were made on the issue of jurisdiction. The justices were of opinion that as a result of the delay, the conduct and preparation of the defence case had suffered irreparable harm, that factors prejudicial to the defence could have been avoided and that a fair trial of the defendants was impossible. They accordingly refused to hear the informations.

Held: The decision of the justices could not be faulted. The power of justices to refuse to hear informations brought before them because they constituted an abuse of the process of the court was explained in *R. v. Derby Justices, ex parte Brooks* (1984) 148 J.P. 609; (1985) 80 Cr. App. R. 164. The justices had correctly applied the principles established in that case and the other relevant authorities to which they were referred. As to the delay in the investigation, the duties of the investigating officer were set out in reg.7 of the Police (Discipline) Regulations 1985 and the Notes of Guidance thereunder. The primary purpose of the regulation, as stated in *R. v. Chief Constable of Merseyside Police, ex parte Calveley* [1986] 1 All E.R. 257 was to put the officer concerned on notice that a complaint had been made and to give him a very early opportunity to put forward a denial or an explanation and to collect evidence in support of that denial or explanation. On the facts of the present case and having regard to the nature of the complaint, the investigating officer should have commenced his investigation within a matter of days of the incident and made a searching inquiry of all the officers concerned immediately after the complainant's acquittal at the Crown Court.

Application: by the Director of Public Prosecutions for judicial review of a decision of the Colwyn justices refusing to hear informations on the ground that they were an abuse of the process of the court.

R. v. Colwyn Justices, ex parte Director of Public Prosecutions Q.B.D.

989

Alternative verdict - whether on indictment for unlawful wounding jury may convict of assault occasioning actual bodily harm.

The appellant was convicted at the Crown Court of unlawful wounding contrary to s.20 of the Offences Against the Person Act 1861. On appeal to the Court of Appeal her conviction was quashed on the ground that the assistant recorder had misdirected the jury on the meaning of "maliciously" in that section. The question then arose whether under s.3 of the Criminal Appeal Act 1968 the court had power to substitute an alternative verdict of assault occasioning actual bodily harm or common assault.

Held: In the ordinary way, unless there were some quite extraordinary facts, an allegation of wounding contrary to s.20 of the Offences Against the Person Act 1861 imported or included an allegation of assault. Certainly on the facts of the present case, admitted by the appellant, she was guilty of assault. Although on the authority of *R. v. Meams* (1990) 154 J.P. 447 the jury could not, as an alternative verdict, have found the appellant guilty of common assault as no count for that offence was included in the indictment, the same did not apply to assault occasioning actual bodily harm.

Accordingly, in the exercise of its powers under s.3 of the Criminal Appeal Act 1968 the court would substitute a verdict of assault occasioning actual bodily harm.

Appeal: by Susan Savage against her conviction at Durham Crown Court of unlawful wounding.

R. v. Savage C.A. (Crim. Div.)

757

Assault occasioning actual bodily harm - conflicting case law on mens rea - meaning of "maliciously" in relation to wounding or inflicting grievous bodily harm (s.20) - Power of Court of Appeal to substitute conviction for actual bodily harm when quashing conviction under s.20.

The appellant was tried on an indictment containing eight counts all relating to injuries caused to his baby son, aged some three months. Six counts represented three paired alternatives under s.18 and s.20 of the Offences Against the Person Act 1861, the seventh alleged a separate offence under s.20 and the eighth, to which he pleaded guilty, alleged cruelty to a person under 16 years. The baby had suffered injuries to the bony structures of his legs and right forearm and the appellant did not dispute that they had been caused by rough handling on his part. The only issue at the trial was whether he had acted with the necessary intent, his case being that he had no experience with small babies and did not realize that handling which (as was accepted by a paediatrician at the trial) would not be inappropriate in the case of a three to four year old child would be quite inappropriate with a new born baby.

On the crucial issue of intent and the meaning of "maliciously" in s.20 the trial Judge directed the jury, *inter alia*, it was enough that the accused should have foreseen that some physical harm to some person, albeit of a minor character, might result. The appellant was acquitted of the three s.18 offences and convicted of all four s.20 offences.

Held: To found a conviction under s.20 of the Offences Against the Person Act 1861 it must be proved that the defendant *actually* foresaw that physical harm to some other person would be the consequence of his act, although the defendant need not *actually* have foreseen that the harm would be as grave as that which occurred. By using the words "should have foreseen" in his direction to the jury, the trial Judge created a real risk that the jury would believe that they were being asked to decide not whether the appellant *actually* foresaw that his acts would cause injury but whether he *ought to have* foreseen it. There was, therefore, an important misdirection in the Judge's summing up and the convictions on the four counts under s.20 would be quashed.

Alternative verdicts under s.47 of the 1861 Act (actual bodily harm) could only be substituted if, assuming in the appellant's favour that the injuries were foreseeable but not actually foreseen, the necessary element of intent for that offence was present. On the necessary intent for s.47, however, there was a conflict between two recent Court of Appeal decisions in *R. v. Savage* (1990) 154 J.P. 757 and *R. v. Spratt* (1990) 154 J.P. 884. The court preferred the decision in *R. v. Spratt* which was founded on a line of authority leading to the conclusion that so far as intent was concerned the test was the same for s.47 as it was for s.20 i.e. the *R. v. Cunningham* test (1957) 2 Q.B. 396 which required proof of intention or recklessness (established subjectively) as to some physical harm to another. The state of the law in that area, however, was totally unsatisfactory and could only be resolved by the House of Lords.

The powers of the Court of Appeal to substitute verdicts of guilty of offences of actual bodily harm under s.47 were limited by the terms of s.3 of the Criminal Appeal Act 1968. In the present case it was clear that in the verdicts of the jury on s.20 there was no implicit finding that the appellant subjectively intended or recognized the risk of physical harm. Accordingly in quashing the convictions under s.20 no other verdicts would be substituted.

Per Mustill, L.J.:

"... it is impossible to contemplate this appeal without dismay. At a time when 'middle-rank' criminal violence is a dismal feature of modern urban life, and when convictions and pleas of guilty on charges under s.47 occupy so much of Crown Court lists it seems scarcely credible that 129 years after the enactment of the Offences Against the Person Act three appeals should come before this court within one week which reveal the law to be so impenetrable. We believe that the authorities can no longer live together, and that the reason lies in a collision between two ideas, logically and morally sustainable in themselves, but mutually inconsistent, about whether the unforeseen consequences of a wrongful act should be punished according to the intent (*Cunningham*) or the consequences (*Mowatt*) ... Until the whole subject has been reviewed by a higher court we can do no better than suggest to trial Judges that subjective intent and subjective appreciation of the risk are the touchstones for which the jury should look, and that for so long as *Mowatt* remains the law the possibility of any physical harm is what the jury, when assessing this subjective element, should be invited to consider. We do not disguise our opinion that the law so stated will in marginal cases be as unworkable in practice as it is objectionable in theory. We can do nothing about this. Only the House of Lords can now put the subject on an even keel."

Appeal: by Philip Mark Parmenter against his conviction at Chelmsford Crown Court of four offences under s.20 of the Offences Against the Person Act 1861.

R. v. Parmenter C.A. (Crim. Div.)

941

Assault - defendant pouring acid into hand/face drier - leaving it in dangerous condition - subsequent user injured - defendant prosecuted for assault - finding that he had no intention to injure anyone - whether defendant guilty of assault.

The defendant, a boy aged 15, was attending a chemistry class. The lesson included work with sulphuric acid and the defendant and the other pupils were warned of the dangers of working with acid. During the course of the experiments the defendant splashed acid onto his hand and poured alkaline onto it in order to neutralize the acid. Later he was given permission to go to the toilet to wash his hand because it was sore. Unknown to his tutor, he took a tube of concentrated acid. At the toilets he poured some of the acid onto some toilet paper and saw that it turned the paper brown. He then heard footsteps in the corridor outside the toilet, panicked, and poured the rest of the acid into a hot air hand/face drier machine. The nozzle of the machine was pointing upwards. When the footsteps receded the defendant left the toilet and discarded the tube on his way back to class. He intended to return later to deal with the acid in the drier. Some time later another pupil went to the toilet to wash his hands. He turned on the drier. The acid was ejected onto his face and caused a permanent scar. The defendant was prosecuted for maliciously causing grievous bodily harm to the other pupil contrary to s.20 of the Offences Against the Person Act 1861 and for assault occasioning actual bodily harm contrary to s.47 of the 1861 Act. The magistrates found that the defendant had not intended to harm the other pupil or anyone else. They dismissed both charges.

The prosecutor appealed against the acquittal of the charge of assault occasioning actual bodily harm, accepting that, on their finding of lack of intent, the magistrates were entitled to acquit of maliciously causing grievous bodily harm.

Held - allowing the appeal: A person who pours a dangerous substance into a machine would be guilty of an assault

of the next user of the machine if he was guilty of relevant recklessness. "Reckless" meant (i) doing an act which in fact created an obvious risk, and (ii) when he did the act he either had not given any thought to the possibility of there being any such risk or had recognized that there was some risk involved but had nonetheless gone on to do it: *R. v. Caldwell* (1981) 145 J.P. 211; *R. v. Lawrence* (1981) 145 J.P. 227; *Elliot v. C.A.C. (A Minor)* (1983) 147 J.P. 425. On the facts found in the present case the defendant knew full well he had created a dangerous situation and the inescapable inference was that he decided to take the risk of someone using the machine before he could get back and render it harmless or gave no thought to that risk. Further, on the findings, although it was panic which led the defendant to pour the acid into the machine, that panic had been engendered by the footsteps which had disappeared before he left the machine. There was no finding that panic caused him to abandon the machine in its dangerous condition.

D.P.P. v. K Q.B.D.

192

Assault on police constable arising out of arrest of a third party - need to prove that arrest was lawful - guidance on form of case stated.

The appellant was convicted of assaulting police constable M in the execution of his duty. He was acquitted of a similar charge in relation to another officer and of obstructing a third officer in the execution of his duty. The facts were as follows: Five police officers went to the appellant's house to arrest his younger brother who they believed to be hiding there, and were admitted to the house by the appellant who was told the reason for the visit. When the brother was found and arrested the appellant pushed past several officers, shouting, and was arrested for obstructing the police. As police constable M and another officer attempted to put the appellant in the police van he allegedly struck the other officer and bit police constable M's thumb. The justices were not told the reason for the brother's arrest.

In dismissing the charge of obstruction the justices found that the appellant, in pushing past the officers, was motivated more by concern for the welfare of his brother than by any deliberate attempt to hinder his arrest. In relation to the dismissed assault charge they were unable to detect any intent or recklessness to assault the officer. On appeal by case stated against the conviction of assaulting police constable M:

Held (allowing the appeal): In order to substantiate an offence of assaulting a police officer in the execution of his duty arising from the arrest of a third party, it was necessary to establish that the arrest of the third party was lawful. Where, therefore, as in the present case, the justices were not told the reasons for the arrest of the third party (the appellant's brother) it was not open to them to find that the arresting officers were, in the course of the arrest, acting in the execution of their duty.

Moreover, the arrest of the appellant himself on the charge of obstruction was unlawful since it was not proved that the arresting constable reasonably believed that if he did not make an arrest there would, or might, be a breach of the peace or an attempt to impede a lawful arrest.

Accordingly, in assisting the other officer, police constable M was acting in furtherance of an unlawful arrest of the appellant and so was not acting in the execution of his duty when he was bitten.

Per Watkins, L.J. (commenting on the form of the case stated):

"Justices must endeavour to ensure in stating a case that (1) the whole of their findings of fact are contained in one and, of course, an early paragraph of the case; (2) their reasons for rejecting a submission of no case to answer are shortly and succinctly stated; and (3) they are not drawn, as these justices were, by the somewhat repeated insistence of the defendant's solicitor, as happened here, to amending a draft case so as to burden it with an over-elaborate discussion upon the law."

Appeal: by Stanley Riley by way of case stated by Newham justices against his conviction of assaulting a police constable in the execution of his duty.

Riley v. Director of Public Prosecutions Q.B.D.

453

Assault on police - whether police officer trespassing on premises entitled to remain there to prevent an anticipated breach of the peace.

The appellant was charged with criminal damage and assaulting a police officer in the execution of his duty. The facts were as follows: Miss W sought the assistance of a police officer in order to collect her belongings from the house where she had been living with the appellant. The police officer, anticipating on reasonable grounds that a breach of the peace might occur, agreed to accompany her and as they walked down the path the appellant came out of the house and ordered them off his land. Miss W told the officer that she was the joint owner of the land and when she went into the kitchen the officer remained outside in the doorway. As she took some keys from a drawer in the kitchen the appellant

attacked her and when the officer entered the kitchen to prevent a breach of the peace there was a violent struggle in which the officer was assaulted and his shirt was damaged.

The justices found that the officer honestly and reasonably believed that he had an implied licence to be on the premises but as Miss W had no title under which to give such a licence, the officer was a trespasser. They concluded, however, that he was not only entitled but bound, by virtue of his office, to act as he did to prevent a breach of the peace so that when he was assaulted he was acting in the execution of his duty.

On appeal by way of case stated it was contended on behalf of the appellant that as the officer had committed an unlawful act by remaining on the premises after his implied licence to be on the premises had been withdrawn by the appellant, he could not thereafter be acting in the execution of his duty without first nullifying his unlawful act by leaving the premises before returning to prevent the breach of the peace.

Held (dismissing the appeal): A police officer was entitled to enter premises to prevent a breach of the peace even though immediately before entering the premises he was a trespasser. He was not obliged to nullify his trespass by leaving the premises before returning to deal with the breach of the peace. Once the police officer anticipated a breach of the peace he had an independent right to remain on the premises and enter the kitchen, so that he was then acting in the execution of his duty.

Appeal: by Thomas Joseph Lamb by way of case stated against his conviction by Leigh justices.

Lamb v. Director of Public Prosecutions Q.B.D.

381

Attempt to commit offence - actus reus - whether s.1(1) of Criminal Attempts Act 1981 should be construed by reference to previous conflicting case law.

The appellant was convicted of attempted murder. The material facts were that he pointed a loaded sawn-off shotgun at the victim at a range of some 10 to 12 inches with the safety catch on. The victim was unclear as to whether the appellant's finger was ever on the trigger. At the end of the prosecution case the Judge rejected a submission by defence counsel that the charge of attempted murder should be withdrawn from the jury on the ground that the evidence was insufficient to support the charge since the appellant would have had to perform at least three other acts before the full offence could have been completed, namely, remove the safety catch, put his finger on the trigger and pull it. On appeal against conviction it was submitted by defence counsel:

(1) that for about a century two different tests as to the *actus reus* of attempt have been inconsistently applied by the courts;

(2) that s.1(1) of the Criminal Attempts Act 1981 had not resolved the question as to which was the appropriate test and

(3) that the so called "last act" test derived from *R. v. Eagleton* (1855) Dears 515, should be adopted.

Held (dismissing the appeal): The Criminal Attempts Act 1981 was a codifying statute which amended and set out completely the law relating to attempts and conspiracies. The submissions made by counsel amounted to an invitation to construe the statutory words by reference to previous conflicting case law, and were misconceived. The correct approach was to look first at the natural meaning of the statutory words, not to turn back to the earlier case law and seek to fit some previous test to the words of the section.

In the present case the question for the Judge was whether there was evidence from which a reasonable jury, properly directed, could conclude that the appellant had done acts which were more than merely preparatory. Once the appellant had pointed the loaded gun at the victim with the intention of killing him there was sufficient evidence for the consideration of the jury on the charge of attempted murder. It was for the jury to decide whether they were sure those acts were more than merely preparatory.

Appeal: by Kenneth Henry Jones against his conviction of attempted murder by Leicester Crown Court.

R. v. Jones (Kenneth Henry) C.A. (Crim. Div.)

413

Attempted rape - whether offence is committed when defendant is reckless as to woman's consent.

Four of the appellants were convicted of attempted rape and the question raised in their appeal against conviction was whether the offence of attempted rape was committed when the defendant was reckless as to the woman's consent to sexual intercourse. The appellants submitted that no such offence was known to the law.

Held: An offence of attempted rape was committed when the defendant was reckless as to the woman's consent to sexual intercourse. The constituent elements in an offence of attempted rape were precisely the same as in an offence of rape, namely:

1. the intention of the offender was to have sexual intercourse with a woman;
2. the offence was committed if, but only if, the circumstances were that:
 - (a) the woman did not consent; AND
 - (b) the defendant knew that she was not consenting or was reckless as to whether she consented.

The only difference between the two offences was that in rape sexual intercourse took place whereas in attempted rape it did not, although there had to be some act which was more than preparatory to sexual intercourse. The intent of the defendant was precisely the same in rape and in attempted rape and the *mens rea* was identical, namely, an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arose; the attempt related to the physical activity; the mental state of the defendant was the same. Recklessness in rape and attempted rape arose not in relation to the physical act of the defendant but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.

The court certified the following question as being one of general public importance, but refused leave to appeal to the House of Lords:

"Can the offence of attempted rape be committed when the defendant is reckless as to the woman's consent to sexual intercourse?"

Appeal: by Mohammed Iqbal Khan and three others against their conviction at the Central Criminal Court of attempted rape.

R. v. Khan and Others C.A. (Crim. Div.)

805

Binding over by Crown Court - duty of Judge to inquire into defendant's means before fixing amount of recognizance.

The applicant was jointly charged with others on indictment with assault occasioning actual bodily harm and unlawful violence. After an 11 day trial he and another co-accused were found not guilty on both counts. The Judge then sentenced three other co-accused who were found guilty and thereafter indicated that he intended to bind over the applicant and the other defendant who had been acquitted and asked their counsel to take instructions as to whether they would consent to being bound over. Having obtained their consent, the Judge bound both of them over to keep the peace for two years in the sum of £3,000 each. No means inquiry was conducted and no submissions were made by counsel in respect of the amount of the recognizance. On application for judicial review (the other defendant who was bound over not having pursued a similar application):

Held: Before fixing the amount of a recognizance in which it was proposed to bind over a defendant before the Crown Court to keep the peace, the Judge was under a duty to inquire into the defendant's means and allow representations to be made in respect of them.

In the present case, no inquiry into means having been made, the appropriate amount of the recognizance to be imposed could not properly have been determined and the binding over order would be quashed.

Application: by Michael John Brace for judicial review of a binding over order made by the Nottingham Crown Court.

R. v. Nottingham Crown Court, ex parte Brace Q.B.D.

161

Breach of the peace - whether a breach of the peace can take place on private premises - issue raised as a preliminary point of law in the county court.

The police were called to a carpet store and when a police officer arrived he found the plaintiff sitting in an office there. The manager asked the plaintiff to leave but he refused and the police officer took him out of the store. The plaintiff then attempted to re-enter the premises and the officer arrested him for conduct likely to cause a breach of the peace. When he later appeared before the magistrates' court on an application that he be bound over to keep the peace, the justices dismissed the case.

The plaintiff then brought an action against the defendant in the county court claiming damages for false imprisonment. The defence was that his arrest and detention were lawful since the officer had reasonable cause to believe that if the plaintiff persisted in trying to re-enter the store, a breach of the peace would or might be occasioned. The plaintiff's case was that if there had been a breach of the peace it would have taken place in the carpet store i.e. on private premises. The Judge was asked to decide a preliminary issue and ruled that a breach of the peace could take place on private premises. On appeal against that ruling:

Held: As a matter of law a breach of the peace could take place on private premises for the purpose of entitling a police officer, who genuinely suspected on good grounds that a breach of the peace might occur, to make an arrest. Whether or not in the instant case the police officer reasonably anticipated a breach of the peace on the private premises at the store was a matter for the county court to decide on the evidence to be adduced.

Appeal: by Thomas Rodney McConnell against a decision on a preliminary point of law made by the Judge in Oldham county court.

McConnell v. Chief Constable of Greater Manchester Police C.A. (Civ. Div.)

325

Common assault - whether jury may convict of common assault on indictment not containing a specific count for that offence - Criminal Justice Act 1988, s.40.

The appellant pleaded not guilty to an indictment containing one count of assault occasioning actual bodily harm. During the trial the Judge overruled a submission by counsel for the appellant that under the provisions of s.40 of the Criminal Justice Act 1988 it was not open to the jury to return a verdict of common assault. He left it to the jury as an alternative and they found the appellant not guilty on the indictment but guilty of common assault.

Held (allowing the appeal and quashing the conviction): By virtue of the provisions of s.40 of the Criminal Justice Act 1988 a person indicted for assault occasioning actual bodily harm could not be found guilty of the lesser offence of common assault (which, under s.39 of that Act, was a summary offence only) unless a count charging an offence of common assault was included in the indictment. Section 6(3) of the Criminal Law Act 1967 (which gave power to a jury to return an alternative verdict) did not apply because common assault was not an offence "falling within the jurisdiction of the court of trial" unless a specific count charging that offence was added.

Appeal: by John Mearns against his conviction at Ipswich Crown Court of common assault.

R. v. Mearns C.A. (Crim. Div.)

447

Community service order - whether appropriate to make consecutive order so that total number of hours under both orders exceeds 240 hours.

The appellant was convicted at the magistrates' court of theft and a community service order was made for the maximum period of 240 hours. Five months later when he had performed only about 30 hours of that order, he was convicted at the Crown Court of having articles for use in connexion with theft and he was again made the subject of a community service order for 120 hours which was ordered to run consecutively to the previous order. On appeal against sentence on the ground, *inter alia*, that the sentence was in breach of s.14(3) of the Powers of Criminal Courts Act 1973:

Held: The prohibition in s.14(3) of the Powers of Criminal Courts Act 1973 "... that the total number of hours which are not concurrent shall not exceed the maximum [of 240 hours]" specified in para.(b)(ii) of s.14(1A), referred to the total number of hours ordered to be served rather than to the total number of hours remaining to be performed. Accordingly, the maximum of 240 hours having been imposed on the earlier occasion, it was not open to the Crown Court to order the second community service order to run consecutively to the first. An order of community service for 150 hours to run concurrently with the previous order would be substituted for the sentence imposed.

Appeal: by Tim Joel Anderson against a consecutive community service order imposed at St. Albans Crown Court.

R. v. Anderson C.A. (Crim. Div.)

862

Compensation order - duty of Judge proposing to make compensation order to raise question of making the order in default of counsel raising it.

The appellant pleaded guilty on indictment to theft and arson and a probation order was made in each case. Additionally he was ordered to pay £1700 compensation. In view of the appellant's parlous circumstances, as indicated in a social inquiry report, his counsel did not raise the question of compensation with the Judge and the Judge himself gave no indication that he intended to make a compensation order until he passed sentence and did not invite counsel to make any submissions on that matter.

Held: Where a Judge had it in mind to make a compensation order and the question of making such an order has not been raised by counsel, it was the duty of the Judge to raise the matter of his own volition so that it could be properly and fairly ventilated. Moreover such an order could only be made, if at all, in such an amount as appeared to be within the means of the defendant.

Accordingly the compensation order would be quashed.

Appeal: by Darren Stanley against sentence imposed at Derby Crown Court.

R. v. Stanley C.A. (Crim. Div.)

106

Compensation order - whether inability of defendant to pay compensation justifies additional custodial sentence.

The appellant was convicted on indictment of a serious offence of obtaining property by deception. In the course of mitigation his counsel indicated that the appellant's financial circumstances were such that he was unable to offer any compensation to the victim. In passing sentence of five years' imprisonment the Judge said "Were you in a position to pay compensation I would reduce the sentence for that ... It seems to me in the circumstances that all I can do is pass the maximum sentence that I had in mind originally, unmitigated by any plea of guilty, expression of repentance on your behalf, or ability to compensate for the evil that you have done". On appeal against sentence:

Held: It must never be thought that by offering to pay compensation a convicted criminal could buy his way out of imprisonment or any part of it. The significance of an offer to pay compensation was that it might be treated as some token of remorse on the defendant's behalf as well as redressing the private loss of the victim. To that extent, and no further, it was reflected in the sentencing exercise, but it must be clearly recognized that a compensation order was otherwise wholly independent of the sentencing exercise.

In the present case, therefore, it was the subject of proper criticism that the terms in which the Judge passed sentence might have given rise to an impression that because the appellant was unable to make compensation, he must therefore receive a longer custodial sentence than that which otherwise the Judge would have regarded as appropriate.

In the circumstances the sentence would be reduced to three and a half years' imprisonment.

Appeal: by Caleb Barney against sentence imposed by Bournemouth Crown Court.

R. v. Barney C.A. (Crim. Div.)

102

Contempt of court - whether interruption of proceedings in magistrates' court caused by acts done outside the court constitutes a contempt within s.12(1)(b) of the Contempt of Court Act 1981.

A stipendiary magistrate was hearing evidence in committal proceedings when the noise of a loudhailer being used outside the court building interrupted the proceedings. The loudhailer was being used by the plaintiff to address demonstrators in the street in relation to the trial of two persons due to be held later that day. As the noise did not stop, the magistrate directed a police officer to bring the person responsible for it before him. The officer assisted by other officers managed, after a struggle, to bring the plaintiff before the magistrate and on being asked by the magistrate if he would cease making the noise, the plaintiff agreed. On leaving the court, however, the plaintiff was arrested for assaulting one officer and obstructing another. At his trial for those offences the prosecution offered no evidence against him and he subsequently issued proceedings in the County Court claiming damages, including exemplary damages, for wrongful arrest, false imprisonment and assault.

On a preliminary question of law raised in those proceedings, it was conceded by the Commissioner that if the magistrate had no jurisdiction to deal with the contempt of court under s.12 of the Contempt of Court Act 1981, the arrest was unlawful. The Judge ruled that only interruptions of court proceedings caused by acts done in court could be dealt with by a magistrate, and held that the magistrate had no jurisdiction to require the plaintiff to be brought before him, that the officers were not acting in the execution of their duty and that the detention of the plaintiff was unlawful. Thereupon the Commissioner submitted to judgment for damages in an agreed sum of £1500.

Held (allowing the appeal): 1. Wilful interruption of proceedings in a magistrates' court constituted a contempt of court within the meaning of s.12(1)(b) of the Contempt of Court Act 1981 whether the interruption resulted from acts done within or outside the court. In the context of s.12 the word "wilfully" meant "intending to interrupt the proceedings" but would also include the state of mind of an interruptor who knew that his acts would interrupt the proceedings but nevertheless proceeded deliberately to do them.

2. In empowering the magistrates' court to deal with contempt in s.12 of the Act, Parliament obviously intended to

confer all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner. In the present case that included the power to order the officer to bring the plaintiff before the magistrate.

Appeal: by the Commissioner of Metropolitan Police from a judgment in an action for damages brought by Mr. Kendal Bodden in the Westminster County Court.

Bodden v. Commissioner of Police for the Metropolis C.A. (Civ. Div.)

217

Costs - assessing costs under defendant's costs order - appropriate question to ask when defendant has instructed leading counsel.

The defendants were charged on an information alleging that on 11 occasions with intent to deceive they produced false documents to a local weights and measures authority, contrary to para.9(4) of the Schedule to the Prices Act 1974, and they instructed leading counsel to appear on their behalf before the justices. The justices dismissed the information and ordered defence costs to be paid out of central funds under s.16(1) of the Prosecution of Offences Act 1985. In assessing the amount to be paid under the order the justices' clerk disallowed the claim for leading counsel's fees, being of opinion that the matters alleged against the defendants could more than adequately have been dealt with by a senior solicitor or junior counsel. The defendants' explanation for employing leading counsel was that the charges amounted to very serious allegations that a wholly owned subsidiary of a publicly quoted and well known company together with a senior representative of that company had committed acts which tended to pervert the course of justice.

Held: In considering whether defence expenses were properly incurred in instructing leading counsel in proceedings where a defendant's costs order under s.16(1) of the Prosecution of Offences Act 1985 was made, the appropriate question was whether the defendant acted reasonably in instructing the counsel which he did and not whether more junior counsel or a solicitor could have adequately dealt with the case.

In the present case, although junior counsel or a senior solicitor could have adequately dealt with the case, it was none the less reasonable for the defendants to employ leading counsel.

Accordingly, the decision of the justices' clerk would be quashed and it would be for him to consider what fees were properly recoverable in respect of the instruction of leading counsel.

Application: for judicial review of a decision of the Clerk to the Dudley justices to disallow leading counsel's costs when assessing defence costs payable out of central funds.

R. v. Dudley Magistrates' Court, ex parte Power City Stores Ltd. and Another Q.B.D.

654

Criminal damage - dismantling and removing parts of structure thereby impairing use of the structure - no physical damage to parts - distinction between damage to removed parts and damage to whole structure.

The appellant was convicted of criminal damage to a scaffold clip and a scaffold bar belonging to the respondent. The facts were as follows: The respondent had erected a barrier comprising a scaffold bar and clip together with an upright across an access road leading to premises used by himself and the appellant. The appellant had dismantled the barrier by removing the scaffold clip and bar which he took to his garage, leaving the upright in position. There was no evidence of any physical damage to the bar itself or of any damage which could be attributed to the appellant.

The justices were of opinion that by dismantling and removing the scaffold clip and bar from the barrier the appellant had impaired the use to which they were put by the respondent and that the fact that the information did not refer to the property damaged as a barrier was not fatal to a conviction on the charge as laid.

Held (quashing the conviction): The term "damage" within the meaning of the Criminal Damage Act 1971 included not only permanent or temporary physical harm but also permanent or temporary impairment of value or usefulness. In the present case there was no evidence that the appellant had caused any physical damage to the clip or bar. The question to be decided, therefore, was whether the dismantling of the barrier constituted damage to the clip and the bar in the wide sense of impairment in their value or usefulness as part of the barrier. If the removal of a part caused damage or impairment to the article as a whole, that could constitute "damage". Had the information been framed so as to allege criminal damage to the whole barrier and not, as was the case, to the clip and bar, the prosecution would, on the authorities, have succeeded. The matter could have been dealt with by way of amendment of the information under s.123 of the Magistrates' Courts Act 1980, but no application so to amend was made to the justices.

Appeal: by Photios Morphis by way of case stated against his conviction by Waltham Forest justices on a charge of criminal damage.

Morphitis v. Salmon Q.B.D.

365

Criminal proceedings - defendant arrested by customs officer for drug related offence and taken to police station to be charged - whether committal proceedings may properly be conducted by the Commissioners as prosecutor.

The defendant was arrested without warrant by customs officers and informed that she would be charged with an offence of assisting another to retain the benefit of drug trafficking under s.24(1)(a) of the Drug Trafficking Offences Act 1986. She was taken to a police station where a police sergeant accepted the charge drafted by a customs officer, formally charged her and admitted her to bail. At the committal proceedings the justices upheld a submission by her solicitor that on the authority of *R. v. Ealing Justices, ex parte Dixon* (1989) 153 J.P. 505, they had no jurisdiction. They dismissed the information on the basis that the Commissioners were not entitled to carry on the prosecution because the proceedings had been instituted on behalf of the police and therefore could only be conducted by the Crown Prosecution Service on behalf of the Director of Public Prosecutions. On application for judicial review:

Held (granting the application): *R. v. Ealing Justices, ex parte Dixon* (1989) 153 J.P. 505 was wrongly decided and the court would decline to be influenced by it. It was an incorrect view of the legislation that a person such as a customs officer who investigated the commission of an offence, arrested a person and took him to a police station to be charged by a custody officer under s.37 of the Police and Criminal Evidence Act 1984, thereby surrendered the prosecution of the proceedings to the Director of Public Prosecutions because the charging process, in stark opposition to the actual facts, deemed the proceedings to have been instituted on behalf of a police force. The charging process was neutral in that context. Proceedings could only be said to have been instituted on behalf of a police force under s.3(2) of the Prosecution of Offences Act 1985 when it was the police who had investigated, arrested and brought the arrested person to the custody officer.

In the present case the proceedings were instituted by the Commissioners of Customs and Excise under specific statutory authority and they were entitled to prosecute independently of the Director of Public Prosecutions under s.6 of the 1985 Act.

Application: by the Commissioners of Customs and Excise for judicial review of a decision of the Stafford Magistrates' court dismissing an information in committal proceedings.

R. v. Stafford Magistrates' Court, ex parte Commissioners of Customs & Excise Q.B.D.

865

Crown Court - compensation order - no power to fix imprisonment in default - duty on counsel for prosecution and defence to ensure that court has power to make order.

The appellants pleaded guilty to conspiracy to defraud and were each sentenced to nine months' imprisonment and ordered to pay £9,837 compensation within four months. In default of payment the court imposed a sentence of six months' imprisonment (consecutive) in each case.

Held: Under the provisions of s.41(1) of the Administration of Justice Act 1970 the Crown Court has no power to fix a sentence of imprisonment in default of compliance with an order of compensation.

Accordingly the sentence of imprisonment in default of payment and the time fixed for payment would be deleted and enforcement proceedings referred to the Ealing magistrates' court.

Per Turner, J.:

"It cannot be too clearly understood that there is a positive obligation on counsel (not just counsel for defendants but counsel who represent the prosecution) to ensure that no order is made that the court has no power to make. That is something which should be fully understood by all members of the Bar.

"The procedure exists under the terms of s.47(2) of the Supreme Court Act 1981 to alter or vary any sentence or order, not only in relation to what might be called the merits of the case, but such power is also available to correct a sentence or order within the period of 28 days, essentially from the time of its making, if, following consideration of the sentence or order, it appears to counsel for the prosecution or counsel for the defence that the order is one that the court had no power to make. Counsel should not hesitate to invite the court to exercise such powers in appropriate cases."

Appeal: against the terms of compensation orders made by Isleworth Crown Court.

R. v. Komsta and Murphy C.A. (Crim. Div.)

440

Crown Court - whether on appeal from magistrates' court Crown Court may order custodial sentence to run consecutively to sentence imposed subsequent to that dealt with on the appeal - Supreme Court Act 1981, s.48.

On October 31, 1988, the applicant was convicted at Portsmouth magistrates' court of unlawful wounding and sentenced to 180 days in a young offender institution. He appealed to the Crown Court against conviction and sentence and was granted bail having served nine days in custody. On March 2, 1989, before his appeal was heard, he was convicted at Brighton magistrates' court of indecent assault and sentenced to 180 days in a young offender institution. On March 10, 1989, the Crown Court dismissed his appeal against conviction and ordered that the custodial sentence imposed on October 31, 1988, should run consecutively to the sentence imposed at Brighton magistrates' court on March 2, 1989.

Held: On appeal from a magistrates' court against a conviction or sentence the Crown Court has no jurisdiction to order that a custodial sentence should run consecutively to a sentence imposed subsequent to that dealt with on the appeal.

Application: by Paul Ronald Ballard for judicial review of a custodial sentence imposed by Portsmouth Crown Court on appeal from Portsmouth magistrates' court.

R. v. Portsmouth Crown Court, ex parte Ballard Q.B.D.

109

Defence that police fabricated evidence - police informer used - ruling that identity of informer should not be disclosed - balance of public interests in favour of defendant - counsel's duty to client over disclosure.

The appellant appeals against a conviction on a count of possessing a controlled drug with intent to supply.

The appellant, whom police believed to be a drug dealer, arrived at a house in Middlesbrough while police officers were searching the premises, and made off. According to prosecution evidence, he was seen to throw something away as he ran and this was later recovered, and proved to be a packet of amphetamine and glucose powder. The appellant was arrested, and his home later searched in his presence, where traces of amphetamine were allegedly found.

The appellant contended at the trial that the evidence was a fabrication by the police to secure a conviction. He alleged that the occupier of the premises, being subject to a suspended sentence for dealing in drugs, had assisted the police by telephoning the appellant to come to his home immediately, while the police were there. Both counsel went to see the Judge, because it was anticipated that in the course of cross-examination of the police officers the occupier would be identified as a police informer. The Judge ruled that they could put questions as to information they had, but not how it was obtained, or from whom. Since the existence of an informer was still unknown to the appellant and his solicitor, his counsel sought the Judge's advice on his duty to his client, and was told not to reveal to him that an informer was involved.

Held: There is a well established rule inhibiting the disclosure of the identity of an informer in a public prosecution, as a special rule of public policy. The Judge has discretion to depart from this rule only if it is necessary to prevent a miscarriage of justice, by depriving a defendant of the opportunity of casting doubt upon the case against him. Otherwise this is a rule of law and not a matter of discretion. The trial Judge was accordingly right in concluding that there was no duty on him to allow the name of an informant to be given in court. In this case, the issue was whether, by adhering to the ruling, counsel was precluded from putting the defendant's case adequately. There was a strong, and in the absence of any contrary indication, overwhelming public interest in keeping secret the identity of the informer; but there was an even stronger public interest in allowing a defendant to put forward a tenable case. In this case adherence to the ruling meant that the defendant's case against the police evidence was emasculated, and since this was the crux of his case, his defence became virtually untenable. It is impossible to say that the jury might not have felt sufficient doubt to reach a different verdict if the ruling had not been made, and therefore the appeal would be allowed.

It was therefore unnecessary to pursue the second ground of appeal, that there were proceedings in the private room which counsel was forbidden to disclose to his client. However, there was strong grounds to believe that this would in itself have been a ground upon which the court would have been compelled to intervene.

Appeal by Vincent Raymond Agar against conviction for possessing a controlled drug with intent to supply.

R. v. Agar C.A. (Crim. Div.)

89

Drunk and disorderly in public place - whether police constable has power of arrest.

The defendant was charged with being guilty, while drunk, of disorderly behaviour in a public place contrary to s.91 of the Criminal Justice Act 1967 and assaulting a police officer in the execution of her duty. Following a disturbance in a car park a woman police officer was assisting another officer to arrest a man when she was approached by the defendant who persisted in shouting abuse at her. She formed the opinion that he was drunk and told him he was being arrested for being drunk and disorderly. During a struggle which followed the defendant assaulted the officer.

At the conclusion of the prosecution case counsel for the defendant submitted that there was no case to answer on the charge of assaulting the police officer in the execution of her duty. The justices upheld the submission being of opinion that the statutory power of arrest under s.91 of the Criminal Justice Act 1967 for the offence of disorderly behaviour while drunk was repealed by s.26 of the Police and Criminal Evidence Act 1984 and the purported arrest did not fall within the general arrest conditions for non-arrestable offences in s.25 of the 1984 Act. Accordingly they found that the officer was not acting in the execution of her duty when she was assaulted. On appeal by way of case stated:

Held (allowing the appeal): The statutory power of arrest in s.91(1) of the Criminal Justice Act 1967 for disorderly behaviour, while drunk, in a public place had not been repealed by s.26 of the Police and Criminal Evidence Act 1984. Paragraph 21 of the Sixth Schedule to the 1984 Act in amending the provisions of s.34 of the Criminal Justice Act 1972 (powers of constable to take drunken offender to treatment centre) specifically referred to a constable "arresting an offender for an offence under ... s.91(1) of the Criminal Justice Act 1967" and so provided in terms that his arrest powers survived. Those powers were unaffected by s.25 of the 1984 Act by virtue of subs.(6) of that section.

Appeal: by the prosecution by way of case stated against a decision of the Barnsley justices.

Director of Public Prosecutions v. Kitching Q.B.D.

293

Fraud case - "preparatory hearing" held under s.7 of the Criminal Justice Act 1987 - limitation on purposes for which such hearing may be held.

The three defendants were committed for trial by justices in March 1989 charged with corruption. Over the course of the following months a number of proceedings were held before a Judge of the Crown Court concerning the forthcoming trial in which he made various orders relating *inter alia* to evidence and procedure. By submissions made on February 5 and 6, 1990, the defendants, having been indicted under what they considered was a "preparatory hearing" in being under ss.7(1) and 8 of the Criminal Justice Act 1987, applied to the Judge to stay the proceedings on the grounds of abuse of process arising out of prejudice through delay among other matters. The Judge decided that the prejudice alleged was not established and dismissed the application, whereupon the defendants applied for leave to appeal to the Court of Appeal. In refusing leave the Judge held that the application as to abuse of process was not a matter falling within the relevant provisions of ss.7 and 9 of the Act of 1987. On application for leave to appeal against the Judge's decision:

Held (refusing the application): In a "preparatory hearing" held under s.7 of the Criminal Justice Act 1987 in fraud cases, all the matters brought before the Judge must relate only to the purposes set out in s.7(1) and the Judge's jurisdiction under s.9(3) of the Act was subordinate to the provisions of s.7(1). If the Judge came to the conclusion that the application before him did not relate to one of those purposes then he could not entertain the application.

Application: for leave to appeal against the decision of a Judge in relation to his powers in a "preparatory hearing".

R. v. Gunawardena, Harbutt and Banks C.A. (Crim. Div.)

396

Imprisonment - whether appropriate to pass a substantial sentence of imprisonment and suspend so much of it that only a tiny fragment is left to be served.

The appellants who were husband and wife pleaded guilty on indictment to an offence of false accounting arising out of the dishonest appropriation of a cheque for £10,000 which was used by them in their business which was on the point of collapse. The husband was sentenced to 12 months' imprisonment of which ten months were suspended and the wife to a like term, 11 months of which were suspended. On appeal against sentence:

Held: Where, as in the present case, a substantial crime has been committed, it was inappropriate to pass a substantial sentence of imprisonment and to suspend so much of it as to leave only a tiny fragment to be served.

In the particular circumstances of the present case a suspended sentence of 12 months' imprisonment would be substituted in each case.

Appeal: by Edward Alfred Strickland and Sylvia Strickland against the sentences imposed on them at Bournemouth Crown Court.

R. v. Strickland (E.A.) and Strickland (S.) C.A. (Crim. Div.)

436

Imprisonment - whether good practice to suspend a short sentence of imprisonment.

The appellant pleaded guilty on indictment to an offence of assault occasioning actual bodily harm on the manageress of a shop and was sentenced to one month's imprisonment suspended for two years and ordered to pay £100 compensation. The plea was accepted by the recorder on the specific basis that the appellant had gone to the shop with her children to ask for directions and when the manageress appeared to be rude to her she aimed several blows at the manageress causing minor injuries. On appeal against sentence:

Held: When imposing a short sentence of imprisonment a court should order it to take effect immediately. It was not good sentencing practice to pass a sentence of one month's imprisonment and then suspend it.

Appeal allowed and a conditional discharge for 12 months substituted.

Appeal: by Monica Grant against a suspended sentence of imprisonment imposed at Southwark Crown Court.

R. v. Grant C.A. (Crim. Div.)

434

Indictment (Procedure) Rules 1971 as amended - preferment of bill of indictment - whether, after expiry of 28 days initial period, officer of Crown Court has power (a) to prefer bill of indictment of his own volition and (b) to extend the initial period after bill has been preferred.

The appellant was convicted of robbery and appealed against his conviction alleging breaches of the Indictment (Procedure) Rules 1971 as amended. The chronology and facts are as follows:

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March 31:	Appellant committed for trial by magistrates' court.
April 18:	Papers received at Crown Court.
April 26:	Crown Court officer sent draft bill of indictment to prosecution for approval and retained copy.
May 3:	Copy bill settled by court officer and so deemed to have been preferred under proviso to r.4.
May 4:	Crown Court officer extended initial 28 day period from April 27 to May 11.
May 5:	Crown Court received draft bill from C.P.S. with request to prefer bill out of time but no reasons given for late application.
May 23:	Indictment duly engrossed and signed.
May 27:	Case listed for plea only; plea of not guilty entered.
July 25:	Case listed for trial but on following day jury had to be discharged and case was transferred to another court where prosecution counsel applied for "leave to prefer" (<i>sic</i>) the indictment and to sign it out of time. The trial Judge gave leave for the indictment to be signed out of time.
July 28:	Appellant convicted.

On behalf of the appellant it was submitted, *inter alia*,

- (a) that the indictment was invalid as it did not comply with the Indictment Rules in that it was not preferred within the 28 day period from committal, i.e. by April 27;
- (b) that the Crown Court officer had no authority to extend the initial period retrospectively on May 4 after the 28 day period had expired;
- (c) accordingly, on May 27 the appellant was arraigned on an invalid indictment.

Held (dismissing the appeal): There was a fundamental distinction between the preferment of a bill of indictment and the signing of the bill which converted it into an indictment. Although r.5(1) of the Indictment (Procedure) Rules 1971 as amended required the bill to be preferred within 28 days of committal, rr.5(2) and 5(3) permitted the appropriate officer of the court to grant the first extension of that initial period of his own volition either before or after it had expired. The requirement under rr.5(4) and 5(5) for reasons to be stated in an application for extension of the period for preferment of a bill, arose only in an "application" case, i.e. where the extension was sought by the prosecution as opposed to a grant by the appropriate officer of his own initiative.

In the present case the court was satisfied that there was no breach of the Rules either as to preferment or as to extension of time. Moreover the bill was properly signed by the appropriate officer of the court on May 23 and thereby

became an indictment and was properly proceeded with under s.2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933. The application to the Judge at the trial to extend the time either to prefer or to sign was unnecessary and was based on a false premise.

Appeal: by Stephen Anthony Stewart against his conviction at Kingston upon Thames Crown Court of robbery.

The court certified that the case involved the following points of law of general public importance but refused leave to appeal to the House of Lords:

- "1. Does r.5(3) of the Indictment (Procedure) Rules 1971 as amended enable an officer of the Crown Court to grant a first extension after expiry of the period of 28 days commencing with committal?
- "2. In the absence of preferment in accordance with the Indictment (Procedure) Rules 1971 as amended, can a bill of indictment become an indictment by signature in accordance with the requirements of s.2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933?"

R. v. Stewart C.A. (Crim. Div.)

512

Indictment - whether bill of indictment valid when signed by the proper officer of the court on the first page and not at the end of the indictment.

On November 14, 1989, the appellant was convicted on four counts relating to drug offences. The voluntary bill of indictment had been preferred by leave of a High Court Judge whose initials were on the front page following the words "Leave to prefer granted". At the end of the indictment which contained several pages was the signature of the trial Judge dated March 3, 1989, on which date the indictment had been amended with leave. The Crown Court clerk checked the indictment on October 13 and recorded on the front page two notes from the court file below which she signed her name but did not date it.

On November 16, 1989, two days after the jury returned their verdicts, counsel for the appellant sought to apply to the trial Judge for a declaration that the trial had been a nullity on the ground that the indictment had not been signed by a proper officer of the court as required by s.2 of the Administration of Justice (Miscellaneous Provisions) Act 1933. The Judge, having considered the matter in proceedings in which counsel for all the defendants charged in the indictment made submissions, rejected the application, but granted a certificate that the case was fit for appeal.

Held: 1. The normal practice, directed in r.4(1) of, and the schedule to, the Indictment Rules 1971 and in para.13.9.1 of the Crown Court Manual, was that the signature of the proper officer of the court should be placed immediately after the last count and be dated. Any departure from that normal practice was strongly to be discouraged. In the present case the Court of Appeal, having heard evidence from the court clerk concerned, was fully satisfied that her signature on the indictment was intended to validate it and counsel's suggested inferences to the contrary could not be sustained.

2. The trial Judge had no jurisdiction to hear the application for a declaration that the trial was a nullity. The jury having returned their verdicts, what should have happened was either (1) an immediate application for leave to appeal to the Court of Appeal or (2) the Judge should merely have been asked for the certificate he in fact granted.

3. The appellant's ground of appeal against conviction arising from the certificate was without substance.

Appeal: by James Laming against his conviction at Southwark Crown Court on the ground that the indictment was a nullity.

R. v. Laming C.A. (Crim. Div.)

501

Prostitution - soliciting woman for the purpose of prostitution - whether persistently driving around red light district amounts to soliciting - Sexual Offences Act 1985, s.2.

The appellant was convicted of persistently soliciting women for the purposes of prostitution, contrary to s.2 of the Sexual Offences Act 1985. The facts, as found by the justices, were that on three occasions between 9.53 p.m. and 10.15 p.m. he was seen by police officers driving his car in a district frequented by prostitutes and their clients. On one occasion within that period he was seen to beckon from his car towards a known prostitute and she was found with him in his car on the third occasion. He had previously been seen with a prostitute in his car four days earlier. The justices were of opinion that driving round the red light district constituted an act of soliciting and that that taken together with the act of beckoning the prostitute, amounted to persistently soliciting women for the purpose of prostitution.

Held (quashing the conviction): In order to constitute "soliciting" within s.2 of the Sexual Offences Act 1985 it was necessary for the prosecution to establish that the defendant gave some positive indication by physical act or words to a

prostitute that he required her services. Merely driving a motor car around the streets of a red light district did not amount to an act of soliciting. Although the act of beckoning a prostitute towards him in the circumstances of the present case did amount to an act of soliciting, that in itself was not sufficient to constitute persistently soliciting.

Appeal: by Alistair Darroch by way of case stated against his conviction by Kingston Upon Hull justices of an offence under s.2 of the Sexual Offences Act 1985.

Darroch v. Director of Public Prosecutions Q.B.D.

844

Recklessness - assault occasioning actual bodily harm - whether test of recklessness is limited to foreseeing a risk of harm and going on to take the risk.

The appellant was indicted on a count of assault occasioning actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861. He pleaded guilty on the specific basis that his conduct was reckless in that he failed to give thought to the possibility of a risk that he might cause actual bodily harm. The facts were that he had fired an air pistol from inside a house into the forecourt of the estate and two of the pellets had struck a seven year old girl playing there. He did not realize that people were there at the time and was adamant that if he had known there were children in the area he would not have fired the shots. By accepting the plea of guilty on that basis the Judge, by implication, ruled that the facts amounted in law to the offence charged.

Held (allowing the appeal): The test of recklessness in relation to an offence of assault occasioning actual bodily harm was that laid down in *R. v. Cunningham* (1957) 121 J.P. 451; [1957] 2 Q.B. 396, namely that the accused had foreseen that the particular kind of harm might be done and yet had gone on to take the risk of it.

Case law on the interpretation of the Offences Against the Person Act 1861 showed that, whether or not the word "maliciously" appeared in the section in question, the courts have consistently held that the *mens rea* of every type of offence against the person covered both actual intent and recklessness, in the sense of taking the risk of harm ensuing with foresight that it might happen.

Accordingly, on the issue of recklessness, a defendant who has not given any thought to the possibility of there being a risk that his act might cause another person actual bodily harm was not guilty of an offence under s.47 of the 1861 Act.

The court then certified the following question as raising a point of law of general public importance, but refused leave to appeal to the House of Lords:

"When recklessness is relied upon as the *mens rea* for the offence of assault occasioning actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861, should it be defined by the test of (1) foreseeing that the particular kind of harm might be done and yet going on to take the risk of it, not caring about the possible consequences; and/or (2) failing to give any thought to the possibility of there being any such risk; or by some other test."

Appeal: by Robert Michael Spratt against his conviction of assault occasioning actual bodily harm by Inner London Crown Court.

R. v. Spratt C.A. (Crim. Div.)

884

Vagrancy Act 1824 - obscenely exposing person with intent to insult female - whether direct evidence of exposure necessary to prove offence.

The appellant was convicted of wilfully, openly, lewdly and obscenely exposing his person with intent to insult a female, contrary to s.4 of the Vagrancy Act 1824. The facts of the case, as found by the justices, were that he pulled back the curtains of the front window of his home and, half naked, he was seen to be masturbating by a woman police officer, though she did not see his penis.

Held (dismissing the appeal): In proceedings against a defendant for an offence of wilfully, openly, lewdly and obscenely exposing his person with intent to insult a female contrary to s.4 of the Vagrancy Act 1824, the question for the justices was whether or not there was evidence from which they could properly infer that at the material time the defendant's penis was exposed. It was not necessary for there to be direct evidence that the male organ was seen by a witness.

On the evidence before them the justices were entitled to convict the appellant.

Appeal: by Douglas William Hunt by way of case stated against his conviction by Hounslow justices of an offence under s.4 of the Vagrancy Act 1824.

Hunt v. Director of Public Prosecutions Q.B.D.

762

Violent disorder alleged against three defendants - insufficient for Judge to define offence in general terms when summing up.

The appellant and two co-accused were charged on indictment with an offence of violent disorder contrary to s.2 of the Public Order Act 1986. The prosecution arose out of a disturbance in a public house and in the course of the prosecution evidence there was a reference to several other persons taking part in the fighting. In his summing up the Judge gave an accurate definition of the offence, following the statutory language word for word, but he did not draw the jury's attention to the possible significance of the evidence that persons other than the accused were taking part in the fighting. The jury found one of the three co-accused not guilty, so that only two of the defendants were found guilty of the offence of violent disorder which required at least three persons to have been participating.

Held: Where only three defendants were accused of the offences of violent disorder contrary to s.2 of the Public Order Act 1986, it was not sufficient for the Judge in his summing up to the jury to define the offence in general terms. It was necessary that he should warn the jury specifically that if any one of the defendants should be acquitted of that offence, then they must necessarily acquit the other two unless satisfied that some other person not charged was taking part in the violent disorder.

The failure of the Judge to give that warning amounted to a misdirection. The conviction for violent disorder would be quashed and a conviction under s.4 of the Act substituted.

Appeal: by Jason Matthew Worton against his conviction at Chelmsford Crown Court of violent disorder.

R. v. Worton C.A. (Crim. Div.)

201

DANGEROUS DRUGS

Dangerous drugs - guidance on law relating to confiscation orders under the Drug Trafficking Offences Act 1986.

The appellant was convicted of conspiring to import cannabis, a confiscation order was made in the sum of £129,300 and he was sentenced to four years' imprisonment. His appeal against conviction having been dismissed, he later appealed against the confiscation order, raising a number of points under the Drug Trafficking Offences Act 1986 which the Court of Appeal understood had caused trouble in various parts of the country. In delivering the judgment of the court dismissing the appeal, the Lord Chief Justice dealt with the structure and import of the Act with particular reference to the procedural requirements. The following is a summary of that part of the judgment:

Held: 1. The object of the Drug Trafficking Offences Act 1986 was to ensure, so far as possible, that the convicted drug trafficker is parted from the proceeds of any drug trafficking he has carried out. Its provisions are essentially draconian.

2. Under the procedure laid down by the Act, if the case before the Crown Court is one where the defendant may have benefited from drug trafficking, sentence must be postponed until the necessary inquiries and determinations have been made on

- (a) whether he has benefited from drug trafficking (s.1(2));
- (b) the extent to which he has benefited (s.1(4); and
- (c) the amount the defendant shall be ordered to pay under s.1(5)(a).

2. If, on a preliminary assessment, the Judge decides that the case is, or is likely to be, a "benefit" case, the prosecution must prove both the fact that the defendant has benefited from drug trafficking and the amount of such benefit. The standard of proof required is the criminal standard but the court may make the assumptions set out in s.2(3). The assumptions can, however, be displaced if the defendant shows, on the balance of probabilities, that they are incorrect.

3. Under s.3 the prosecution may tender a statement relative to the issues of whether the defendant has benefited and the amount of such benefit, which, if accepted by the defence, may be treated as conclusive. When the defendant has been served with such a statement the court may require him to indicate to what extent he accepts the prosecution allegation and, if he does not, to indicate any matter on which he proposes to rely. The prosecution must adduce evidence to establish any of the contents of the statement on which they wish to rely which are not accepted by the defendant.

4. The Judge then hears the evidence on either side and reaches his conclusion as to (1) whether the defendant has successfully rebutted any provisional assumptions under s.2; (2) the existence of any benefit from drug trafficking; and (3) the value of such benefit.

5. By virtue of s.4 where the court is satisfied that the amount that might be realized at the time the confiscation order is made is less than the value of the proceeds of drug trafficking, the court has then to determine the amount which might be realized, and the confiscation order will be for that lower sum.

Appeal: by David Dickens against a confiscation order made at Maidstone Crown Court.

R. v. Dickens C.A. (Crim. Div.)

979

Drugs - whether confiscation order made under the Drug Trafficking Offences Act 1986 forms part of the sentence under s.9 of the Criminal Appeal Act 1968 and is therefore subject to appeal.

The appellant was convicted of possessing cannabis with intent to supply and was sentenced to six months' imprisonment and a confiscation order was made under s.1 of the Drug Trafficking Offences Act 1986 in the sum of £5,000.

On appeal against the confiscation order the Court of Appeal raised of its own motion the issue of whether such an appeal lay under s.9 of the Criminal Appeal Act 1968 having regard to the definition of "sentence" in s.50(1) of that Act. The court also considered in some detail the provisions of the Drug Trafficking Offences Act 1986 with particular reference to ss.1-5 and s.38.

Held: 1. Despite the wording of s.1(4) and s.1(5) of the Drug Trafficking Offences Act 1986, a confiscation order made under s.1 of that Act formed part of the sentence for the purpose of s.9 of the Criminal Appeal Act 1968 and was therefore subject to appeal.

2. In relation to confiscation orders generally, it was important that the stages prescribed in the 1986 Act should be closely followed. At each stage of the procedure the court should state the relevant findings made. Thus at the stage of the assessment of the value of the proceeds of drug trafficking it was important to state:

- (a) by reference to s.2(3) of the Act, what assumptions, if any, have been made;
- (b) the payments or other rewards which (after taking account of any such assumptions) the court found had been received by the defendant; and
- (c) the aggregate of the values of the payments or other rewards.

Appeal: by Julie Johnson against a confiscation order made under the Drug Trafficking Offences Act 1986 by the Inner London Crown Court.

R. v. Johnson C.A. (Crim. Div.)

955

EVIDENCE

Evidence - admissibility of statement of witness who does not give oral evidence in committal proceedings through fear - Criminal Justice Act 1988, ss.23(1)(ii), 23(3) and 26.

Both cases raised similar points and were dealt with together in the Divisional Court.

In the first case the applicants were charged in committal proceedings under s.6(1) of the Magistrates' Courts Act 1980 with aggravated burglary, violent disorder, malicious wounding and criminal damage. One of the prosecution witnesses was a victim of a very serious assault and she did not attend the hearing to give evidence through fear. The justices ruled that the statement she had made to the police was admissible in evidence under s.23(3)(b) of the Criminal Justice Act 1988. It was not in dispute that her fear arose as a result of the experience of the offence and not because of an attempt subsequently to place her in fear.

In the second case the applicant Lawlor was charged with attempted murder. A prosecution witness aged 16 years failed to attend the committal proceedings to give evidence and when he was brought to the court by the police, he refused to enter the court room to give evidence because he was in fear. A police officer gave evidence to that effect and the magistrate found as a fact that the witness was in fear within the meaning of s.23(3)(b) of the 1988 Act and ruled that he had no discretion but to admit his statement in evidence. Although the magistrate did not consider the provisions of s.26 of the 1988 Act, he stated in an affidavit to the Divisional Court that had he done so, his decision would have been the same.

Held (refusing the applications): Under s.23 of the Criminal Justice Act 1988 a statement in writing made by a person was admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible, where he did not give evidence through fear. It was immaterial whether the fear arose as a result of the circumstances of the offence or of something which had occurred since the commission of the offence. The criminal standard of proof applied to the requirements of s.23(3). Once the court had ruled that the statement was admissible

under s.23(?) the court had then to decide under s.26 (which applied to committal proceedings) whether, nevertheless, the statement ought not, in the interests of justice, to be admitted. Those dual tests - admissibility and whether to admit - which had to be applied before a statement was admitted in evidence would in many circumstances call for the most careful and scrupulous exercise of judgment and discretion.

In the first case there was nothing to show that the justices did not apply s.26 in their deliberations and, in the second case, the court was satisfied that although the magistrate did not consider that section, he would in any event have allowed the statement to be read.

Applications: by Christopher McMullen and others for judicial review of a decision of Acton justices and by Jason Lawlor for judicial review of a decision of the Tower Bridge stipendiary magistrate, in both cases relating to the admissibility of written statements under s.23(3) of the Criminal Justice Act 1988 in old style committal proceedings.

R. v. Acton Justices, ex parte McMullen and Others Q.B.D.

R. v. Tower Bridge Magistrates' Court, ex parte Lawlor Q.B.D.

901

Evidence - admissibility of unsworn evidence of young child - effect of repeal of statutory requirement of corroboration - Children and Young Persons Act 1933, s.38.

The applicant was charged with incest against his five year old daughter who, at the time of the trial, was six years of age. On the issue of whether her evidence was admissible the Judge, having seen a video film of the little girl in conversation with a social worker and having questioned her through a video link, ruled that it would not be appropriate for her to take the oath, but he allowed her to give evidence unsworn through a video link. On application for leave to appeal against conviction:

Held (dismissing the application): The admissibility of a young child's evidence was still governed by s.38(1) of the Children and Young Persons Act 1933 and the question to be decided by the court in each case was whether the child was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth. Obviously the younger the child, the more care the Judge must take before he allowed the evidence to be received, but the statute laid down no minimum age and it was for the Judge to exercise his discretion judicially.

The repeal of the proviso to s.38(1) of the Act (requiring that the unsworn evidence of a young child had to be corroborated by other material evidence) reflected a change of attitude by the public to the acceptability of the evidence of young children and an increasing belief that their testimony, when all precautions have been taken, might be just as reliable as that of their elders.

Application: by C.A.B. for leave to appeal against his conviction at the Central Criminal Court of incest.

R. v. B (C.A.) C.A. (Crim. Div.)

877

Evidence - admissions obtained in breach of the Code of Practice under the Police and Criminal Evidence Act 1984 - discretion to exclude the evidence under s.78.

The appellant was convicted on indictment of possessing an offensive weapon namely a spear found in his car. Following his committal for trial he was served with statements from two police officers as additional evidence giving details of a conversation between them and the appellant at the time of his arrest in which the appellant allegedly made certain admissions. At the commencement of the trial counsel for the appellant objected to the admissibility of the two statements. In the *voir dire* the officers gave evidence that after questioning the appellant they later made up their notes, but there was no reason recorded in the pocket book as to why the interview had not been contemporaneously recorded, nor had the appellant been given the opportunity to read the notes. There were thus clear breaches of paras.11.3(b)(ii), 11.6 and 12.12 of the Code of Practice (Code C) made under the Police and Criminal Evidence Act 1984.

Counsel for the appellant made submissions (1) that the appellant was at a disadvantage because he had been denied the opportunity of indicating at the time whether he agreed or disagreed with the officers' notes and (2) that by the improper obtaining of the evidence the appellant had been denied the choice which he otherwise might have had of not giving evidence and of relying on the jury rejecting the more weaker case the prosecution would then have had. The assistant recorder, without giving reasons, ruled against the submissions. At the trial the appellant's case which he made in evidence was that the interview never took place and he had no knowledge of the spear in the car which he had only recently acquired.

He appealed on the ground that the evidence was wrongly admitted.

On appeal, the Court of Appeal reviewed in detail the decisions of the Court since the appellant's trial.

Held (allowing the appeal): Section 78 of the Police and Criminal Evidence Act 1984 had been given a wide construction by the Court of Appeal and it was now clear that a court had a discretion to exclude "confession" evidence if "admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought

not to admit it". In the present case the court was concerned with the provisions of the Code of Practice aimed at preventing "verballing" and the credible allegation of "verballing". At the stage when objection to the evidence was taken, the trial Judge was not apprised of all the facts - he could not know what would happen if he admitted the evidence, nor what would happen if he excluded it - e.g. in the latter case, would the appellant then go into the witness box?

At first sight it seemed unjust that evidence, otherwise admissible, should be excluded under s.78 when, if all the facts, and particularly what the defence's response was going to be, were known, it would be clear that admission of the evidence would not have "an adverse effect on the fairness of the proceedings". Within the confines of the present rules of criminal procedure, however, there was no way in which that difficulty could be avoided. The decision had to be made at a stage when the Judge did not know the full facts.

In cases where there have been significant and substantial breaches of the "verballing" provisions of Code C, the evidence so obtained would frequently be excluded. But not every breach or combination of breaches of the Code would justify exclusion of interview evidence under s.76 or s.78 of the Act. They must be significant and substantial.

In the light of the decisions of the Court of Appeal the assistant recorder erred in assuming (as it appears) that any unfairness resulting from the admission of the two statements could be cured by the appellant going into the witness box on the following grounds:

(1) If the appellant intended not to give evidence if the officers' evidence was excluded, then admitting it unfairly robbed him of his right to remain silent.

(2) If the defence case was to be (as it was in fact) that the evidence was concocted, then it was unfair to admit it because by doing so the appellant was not only forced to give evidence but also, by attacking the police, to put his character in issue.

(3) If the defence was to be that the interview was inaccurately recorded then it was unfair to admit it because it placed the appellant at a substantial disadvantage in that he had been given no contemporaneous opportunity to correct any inaccuracies nor would he have his own contemporaneous note of what he had said.

Appeal: by Graham Keenan against his conviction at Southwark Crown Court of possessing an offensive weapon.

R. v. Keenan C.A. (Crim. Div.)

67

Evidence - admissions obtained in breach of Code of Practice under Police and Criminal Evidence Act 1984 - vital importance of rules relating to contemporaneous noting of interviews.

The appellant was convicted on two counts of conspiracy to rob and one of transferring a firearm to another. He was originally charged with theft of a motor cycle but in the light of admissions made by another defendant he was questioned about a planned robbery. He eventually made admissions in two separate interviews on consecutive days, neither of which was contemporaneously recorded but each of which was followed by another interview which was contemporaneously recorded. In the latter interviews he repeated admissions which he was alleged to have made in the earlier unrecorded interviews. On the *voir dire* the appellant gave evidence that the admissions were untrue and that the police had induced him by a trick to make them. The reasons given by the two police officers for not recording the interviews 1 and 3 contemporaneously were that the best way was not to record them and they indicated that by the initials "B.W." (meaning "best way") on the document they prepared. There were other breaches of rr.11.3 and 11.6 of the Code of Practice.

The Judge overruled a submission that the statements be excluded under s.76 or s.78 of the Police and Criminal Evidence Act 1984.

Held: The importance of the Code of Practice under the Police and Criminal Evidence Act 1984 relating to the contemporaneous noting of interviews could scarcely be over-emphasized. The object was twofold: not merely to ensure, so far as possible, that the suspect's remarks were accurately recorded and that he had an opportunity when he went through the contemporaneous record afterwards of checking each answer and initialling each answer, but likewise it was a protection for the police, to ensure, so far as possible, that it could not be suggested that they induced the suspect to confess by improper approaches or improper promises.

In the present case the fact that the most important evidence in the form of a contemporaneous note was not available to the Judge on the *voir dire* was sufficient to bring the case within s.78 of the Act. The breaches were flagrant, deliberate and cynical.

Appeal: by Ramon Michael Canale against his conviction at the Central Criminal Court.

R. v. Canale C.A. (Crim. Div.)

286

Evidence - confession obtained in breach of Code of Practice - meaning of "interview" in paras.11 and 12 of Code C - procedure where defendant refuses to read or sign record of interview.

The three appellants were convicted of kidnapping and assault occasioning actual bodily harm. Following their

remand in custody at the magistrates' court a woman police sergeant had two conversations with Matthews in the second of which she made a confession. The sergeant said that Matthews started the conversation but, after being cautioned, she said "I'll talk about it but not if you write it down". The conversation continued with the superintendent asking her some questions, following which she was taken back to her cell and the sergeant made a note of the conversation in her pocket book. The note was not shown to Matthews in order to give her the opportunity to read it and sign it as correct or to indicate otherwise, because the sergeant thought it would be a completely wasted operation. At the *voir dire* the Judge heard evidence and submissions and decided, notwithstanding the breaches of para.12.12 of Code C of the Codes of Practice not to exclude the confession. On appeal it was suggested, *inter alia*, that the conversation could not properly be called an "interview" within the meaning of paras.11 and 12 of the Code.

Held: It was not within the spirit of the Police and Criminal Evidence Act 1984 or the Codes of Practice under that Act, that "interview" should be given a restricted meaning. Normally any discussion or talk between a suspect or prisoner and a police officer about an alleged crime would amount to an "interview" whether instigated by the suspect or prisoner or police officer. In the present case the conversation between the sergeant and Matthews was an interview.

In relation to para.12.12 of Code C (documentation of interviews in police stations) if such a statement made by a prisoner was shown to him by a police officer and the prisoner refused to read it or sign it, it might be a wise precaution for the police officer to serve a photostat copy of the statement on the prisoner's solicitor, noting on the Person in Custody Sheet the time of so doing and the reasons for doing it.

In the present case the Judge was properly entitled to decide not to exclude the confession in the exercise of his discretion.

Appeal: by Sarah Matthews and others against their conviction at Shrewsbury Crown Court.

R. v. Matthews and Others C.A. (Crim. Div.)

177

Evidence - corroboration - whether evidence of co-defendant can corroborate evidence of accomplice.

The appellant and a co-defendant were charged with handling stolen goods. B who had been convicted with others of robbery of a substantial amount of gold, gave evidence for the prosecution that he and another man took the gold, for the purpose of smelting down, to the appellant's refinery where the co-defendant was a metallurgist. The main issue was whether the two defendants knew that the gold was stolen property and the question arose whether, having regard to the substantial weight of the gold, it was brought to the premises in one bag or two. B testified that there were two bags which both arrived together in the morning when both the accused were there. The appellant alleged that only one bag was brought to the refinery, that he did not know that the gold was stolen, and that if the entire consignment of gold had arrived, much of it must have arrived after he left the premises. The co-defendant, giving evidence on his own behalf, stated that all the gold arrived in one consignment only, in the morning.

The Judge warned the jury that B was an accomplice and that they could not convict unless his evidence was corroborated in a material particular. He further warned them of the dangers of acting against one defendant only on the evidence of the other, and ruled that the co-defendant's evidence was capable of corroborating B's account that there was only one delivery of the two bags of gold in the morning.

On appeal against conviction, it was submitted on behalf of the appellant that, in law, both B and the co-defendant were accomplices of the appellant, and as such, as a matter of law, the evidence of one could not corroborate the evidence of the other.

Held (dismissing the appeal): The evidence of a co-defendant given in the course of his testimony on his own behalf and not as a prosecution witness, was capable of corroborating the evidence of an accomplice called as a witness for the prosecution. Although the evidence of one accomplice could not corroborate the evidence of another accomplice if both gave evidence for the prosecution, that did not apply in the present case where the accomplice (the co-defendant) was not a witness for the prosecution.

Appeal: by Brian Charles Wade against his conviction at the Central Criminal Court of handling stolen goods.

R. v. Wade C.A. (Crim. Div.)

1003

Evidence - discretion of Judge to allow prosecution to re-open case to admit further evidence - misunderstanding between prosecuting and defence counsel.

The appellant was convicted of robbery involving an attack by two men on a security guard who was delivering a consignment of cash to premises. The only evidence of identification was given by the driver of a delivery vehicle who saw two men in a parked car close to the premises immediately before the robbery. At an identification parade in which the appellant, three other suspects and 17 members of the

public took part, the witness failed to identify the appellant but immediately afterwards he told the police inspector in charge that it was the man standing at position no.20 in the parade. At the trial the witness gave evidence that the driver of the car was the man standing at position no.20.

At the close of the prosecution case defence counsel submitted that there was no case to answer as the prosecution had failed to prove an essential link in their case, namely, that the man standing in that position in the parade was the appellant. The prosecution, having assumed that the identity of that man was not in issue, applied to recall the police inspector in charge of the parade, and the Judge granted the application.

Held: The general rule that the prosecution must call the whole of their evidence before closing their case was subject to two well established exceptions, namely:

1. the prosecution might call evidence in rebuttal to deal with matters which have arisen *ex improviso*, and
2. where, what has been omitted was a mere formality as distinct from a central issue in the case.

The discretion of the Judge to admit evidence after the close of the prosecution case was not, however, confined to those two exceptions. There was a wider discretion which, though it could not be defined precisely, should only be exercised on the rarest of occasions.

In the present case the failure of the prosecution to adduce the evidence of identity was not due to an oversight but to a simple misunderstanding between counsel as to whether the name of the person standing in position no.20 was in issue. Accordingly, in the exercise of his discretion, the Judge was entitled to admit the evidence.

Appeal: by Peter Robert Francis against his conviction of robbery at Birmingham Crown Court.

R. v. Francis C.A. (Crim. Div.)

358

Evidence - discretion to admit statement of deceased prosecution witness - relevance of possibility of statement being controverted by defence witnesses - Criminal Justice Act 1988, s.26.

The appellant was charged on indictment with assaulting a security guard thereby occasioning him actual bodily harm. At the start of the trial the prosecution applied under s.23 of the Criminal Justice Act 1988 to admit in evidence the formal statement of a deceased witness which had been used in the committal proceedings. The defence counsel, in opposing the application, submitted that it was not properly made under the 1988 Act but under s.13 of the Criminal Justice Act 1925 which had not been repealed. The Judge allowed the statement to be read under s.26 of the Criminal Justice Act 1988.

On appeal against conviction defence counsel did not proceed with his contention that s.13 of the 1925 Act was the relevant provision. He submitted, however, that the Judge had erred in admitting the statement by taking into account an irrelevant consideration under s.26(ii) of the 1988 Act, namely that the appellant might, if he chose, by his own evidence or that of other witnesses, controvert the statement of the deceased witness. That had the effect of putting improper pressure on the defence to call evidence. He submitted that the words in that section "whether it is likely to be possible to controvert the statement if the person making it does not attend" contemplated only, and should be restricted to, the possibility of controverting the statement by cross-examination directed to witnesses to be called by the prosecution.

Held: 1. The test of admissibility was clearly laid down in s.26 of the Criminal Justice Act 1988. The meaning of "controvert" included that of "dispute" or "contradict". The court was entitled to have regard to such information as it had at the time the application was made which showed "whether it is likely to be possible to controvert the statement" in the absence of the ability to cross-examine the maker. The court was not required to assess the possibility of controverting the statement upon the basis that the accused will not give evidence or call witnesses. The trial Judge had not erred in law in admitting the statement by having regard to the likelihood of it being possible for the appellant to controvert the statement by himself giving evidence or calling witnesses.

2. In the present case it was not necessary to determine the precise relationship between the discretion of the court to exclude a statement admissible by virtue of s.23 of the 1988 Act and the discretion of the court to exclude a statement admissible under s.13(3) of the 1925 Act. The court, however, expressed the view, *obiter*, that when the grounds of admission of the statement are covered by both sections (as in this case) the court could properly, and should, apply the test laid down in s.26 of the 1988 Act.

Appeal: by Michael Patrick Cole against his conviction of assault occasioning actual bodily harm at Kingston Crown Court.

R. v. Cole C.A. (Crim. Div.)

692

Evidence - identification of person accompanying alleged offender at time of offence - whether "Turnbull direction" required.

The appellant was convicted at the Crown Court of theft and obtaining property by deception. The facts were that the proprietor of a second-hand shop bought from a young man who was accompanied by two children a video and three cassette tapes which had been stolen from the house of the appellant's sister earlier in the day. The following day the sister along with one of her children went to the shop and in his evidence the proprietor said that he recognized the child without a doubt as the younger of the two children who had been with the young man at the time of the sale the previous day. He also gave a description of the young man but was not able to identify the appellant. When interviewed by the police the appellant said he was at home at the time. He did not give evidence at his trial and the proprietor's identification of the child was not challenged by the defence.

On appeal against conviction the issue raised was whether the Judge ought to have given a *Turnbull* direction to the jury in regard to the evidence of identification. (See *R. v. Turnbull* (1976) 140 J.P. 648).

Held: Where the identity of the offender was in issue and there was strong evidence that the accused was with A at the relevant time, a purported identification of A at the scene should, as a rule, be the subject of a *Turnbull* direction provided that such identification was alleged by the defence to be mistaken. In such circumstances, to identify the accused's companion as being present at the scene alongside the offender was, practically speaking, to identify the latter as the accused. All the considerations which led to the establishment of the *Turnbull* guidelines logically applied to such a case just as much as to one involving a direct identification of the accused himself.

In the present case, however, there was no challenge to the proprietor's identification of the younger child and in those circumstances the Judge was not under any duty to give a *Turnbull* direction.

Appeal: by Michael Geoffrey Bath against his conviction at Chester Crown Court of theft and obtaining property by deception.

R. v. Bath C.A. (Crim. Div.)

849

Evidence - identification parade - whether police officer's evidence of what identifying witness had said in absence of accused is admissible.

The appellant was charged with wounding with intent in a public house. At an identification parade 12 weeks after the alleged attack, he was identified by the licensee. The identification suite consisted of two parallel rooms divided by a two-way mirror. The suspect and volunteers were each numbered and were in one room whilst the identifying witness, a police inspector and the appellant's solicitor were in the other. The system was sound proofed and there was no physical contact between anyone on the parade and the witness was invited to make his identification by indicating verbally the number of the person he identified. He did so by saying "It is no.8". At the trial three months later the identifying witness was unable to recall the number of the person he had identified. The police officer who had conducted the parade told the court that the appellant was at position no.8 but, on being asked what the witness had told him as he made his identification, objection was taken by defence counsel on the ground that the evidence would be hearsay and inadmissible. The trial Judge overruled the objection and the evidence was admitted. On appeal, following conviction, it was submitted that the inadmissible evidence adduced amounted to a material irregularity in the trial.

Held (dismissing the appeal): The admissibility of the words "It is no.8" was fully justified because the contemporary observation (albeit made by the witness in the absence of the appellant) accompanied a relevant act and was necessary to explain that relevant act. The statement was not relevant to the identity of the assailant but it was relevant as to the identification of the suspect by the witness. In asserting that the man whom the witness thought was the assailant was no.8 on the parade, the witness was doing no more and no less than explaining his physical and intellectual activity in making the identification at the material time. Whether the true analysis of the statement was that it was original evidence or whether it was admissible as an exception to the hearsay rule, the Judge came to a proper decision.

Moreover the identification procedure adopted followed precisely the provisions of Code D of the Codes of Practice made under s.67 of the Police and Criminal Evidence Act 1984 so that if the words used by the witness were in truth hearsay then, quite apart from the *res gestae* rule, there was statutory authority for their admission in criminal proceedings.

Appeal: by Graham McCay against his conviction at Inner London Crown Court.

R. v. McCay C.A. (Crim. Div.)

621

Evidence - previous consistent statements - witness statement to police - tests of admissibility.

The appellant was convicted of unlawful wounding at Maidstone Crown Court on April 27, 1989, and sentenced to 12 months' detention in a Young Offender Institution. The appellant was then aged 20 years old. His co-accused, Drury, was sentenced to imprisonment for the same offence. The appellant appeals against conviction and sentence.

On December 1, 1988, in the lavatory of a public house it was alleged that the appellant and Drury attacked George Wicker, causing him injuries to the face, including a fractured nose. Mr. Wicker denied that he had in any way provoked the attack. It appeared that the appellant also sustained a broken nose in the incident. The appellant later went voluntarily to the police station and made a witness statement, blaming Mr. Wicker. At the trial the defence sought permission to adduce the statement so that it would become evidence in the case. The Judge declined to accede to the submission.

Held: In addition to the three principal circumstances in which previous consistent statements may be admissible, there is a further category concerning answers of a defendant when taxed with the situation either by the police or by somebody else. The test which should be applied is partly that of spontaneity, partly that of relevance and partly that of asking whether the statement which is sought to be admitted adds any weight to the other testimony in the case.

In the present case the statement was a witness statement, and not a statement made in answer to a charge. However, this would make no difference. The statement was clearly spontaneous, being made when the appellant accompanied the police officer to the police station. However, on the other test, of adding to the weight of the other testimony, the jury had heard evidence from the licensee of the public house and from the police officer, and the statement did not add anything relevant to the evidence before the court, and would in any event have been evidence only of the appellant's reaction, which was already proved.

With regard to the sentence, whilst a custodial sentence was correct for an unprovoked assault of this nature, in view of the appellant's own injury, his age, and the fact that this was his first offence, a similar sentence reduced to six months' detention would be substituted. He could be distinguished from his co-accused who had a previous conviction for violence.

Per curiam: The judgment in *Pearce* (1979) 69 Cr. App. R. 365 indicates that there is an area of uncertainty in such cases, since it is impossible to define in advance those statements which should be admitted and those which should not. A statement which contains an admission is evidence of the facts admitted, while a statement which is not an admission is admissible to show the attitude of the accused when he made it.

Appeal by Mark Adrian Tooke against conviction and sentence at Maidstone Crown Court.

R. v. Tooke C.A. (Crim. Div.)

318

Evidence - whether prosecution may comment on defendant's failure to give evidence when comment is not unfavourable - Criminal Evidence Act 1898, s.1(b).

The appellants were both convicted on indictment of attempting to obtain property by deception. At the trial the appellant Riley did not give evidence and counsel for the prosecution, in his final address to the jury referred to that fact. He said "The defendant has not given evidence; you must not hold it against him that he has not given evidence. It is for the prosecution to prove his guilt, not for him to prove or disprove anything. When you come to consider the evidence against Riley, the only evidence you have is what the prosecution put before you and what he said in interview. There is no evidence from the defence to contradict the matter." In the absence of the jury an application by defence counsel for a new trial was refused by the assistant recorder who, later, in the course of his summing-up dealt with the question of Riley's failure to give evidence and explained the legal position.

Held: The provision of s.1(b) of the Criminal Evidence Act 1898 that the failure of a defendant to give evidence "shall not be made the subject of any comment by the prosecution" meant there was to be no comment whatsoever by the prosecution, whether favourable or unfavourable. Where, as in the present case, there had been a breach of that statutory provision, the question to be considered was whether the breach had been put right in the summing-up. The court was satisfied that it had been put right by the assistant recorder and the point taken by defence counsel on that matter had no merit.

Appeal by Bernard Riley and Brian John Everitt against their conviction by Sheffield Crown Court of attempting to obtain property by deception.

R. v. Riley and Everitt C.A. (Crim. Div.)

637

FIREARMS

Firearms - whether an offence under s.5 of the Firearms Act 1968 is one of strict liability or one which requires proof of mens rea.

The appellant pleaded not guilty on indictment to possessing a prohibited weapon contrary to s.5(1) of the Firearms Act 1968. The facts of the case were that having been arrested on another matter, he was searched and a metal canister containing CS gas was found in his jacket pocket. It was accepted that CS gas was a noxious gas and that, with the container, it was a prohibited weapon within the meaning of s.5(1)(b) of the Act. At the outset of the trial the assistant recorder ruled that s.5 created an absolute offence not requiring proof of *mens rea* whereupon the appellant changed his plea to guilty.

On appeal against conviction the issue raised was whether under s.5 of the Firearms Act 1968 once the prosecution have proved that an accused knowingly had in his possession an article which was in fact a prohibited weapon, it was a defence for the accused to show on the balance of probabilities that he neither knew nor suspected nor could have been expected to know that the article was a prohibited weapon.

Held (dismissing the appeal): Section 5 of the Firearms Act 1968 created an offence of strict liability which did not require proof of *mens rea* and it was not open to the defence to raise and prove on the balance of probabilities that the accused did not know and could not reasonably have been expected to know that he was in possession of a prohibited weapon. Accordingly, in the present case, it would have been no defence for the appellant to maintain that he did not know or could not reasonably have been expected to know that the canister contained CS gas.

Appeal by Liam Christopher Bradish against his conviction at Acton Crown Court of an offence under s.5 of the Firearms Act 1968.

R. v. Bradish C.A. (Crim. Div.)

21

FORESTRY

Forestry - who can commit the offence of felling trees without a licence - s.17, Forestry Act 1967.

Where a felling licence issued by the Forestry Commissioners must be obtained before trees can be felled, the true construction of s.17 of the Forestry Act 1967 is that any person who fells trees without obtaining a licence is guilty of an offence, and the section cannot be interpreted on the more limited basis that only persons who own estates or interests in the land concerned can commit the offence.

Appeal by way of case stated against a decision of the justices for the petty sessional division of Leighton Buzzard.

Forestry Commission v. Frost and Thompson Q.B.D.

14

HIGHWAYS AND FOOTPATHS

Highways - correct approach of magistrates when dealing with an application for stopping up - s.116 and sch.12, Highways Act 1980.

Where the magistrates are being asked to make an order stopping up a highway under s.116 of the Highways Act 1980, (a) their jurisdiction is conditional on the highway authority having complied substantially with the requirements of sch.12 of the Act, relating to the giving of public notice of the application to the magistrates, and in particular, in a case where the application is for only part of a highway to be stopped up, the requirement of displaying prominent notices at each end of the highway should be interpreted as requiring the display of notices at the ends of the sections concerned, rather than at the ends of the highways; and (b) although the question of whether a highway is unnecessary is a question of fact for the magistrates, (i) it may be helpful to proceed by asking whether the way is unnecessary for the sort of purposes for which the magistrates would reasonably expect the public to use that particular way (e.g. for access to a

particular place, or for recreational purposes), and (ii) where there is evidence of actual use of the way by the public, it will be difficult for the magistrates to make a finding that the way is unnecessary, unless there is also evidence that there is, or is going to be, a reasonably suitable alternative way, which will be equally as available as the way in respect of which the application is being made, and (iii) if the magistrates, having found that the way is unnecessary, are then required to state a case for the opinion of the High Court, they should give the reasons for that finding.

Appeal by way of case stated against a decision of the justices for the County of Kent, sitting as a magistrates' court at Folkestone.

Ramblers' Association v. Kent County Council Q.B.D.

716

Highways - obstruction by trolleys parked outside a supermarket - correct approach to be taken - s.137, Highways Act 1980.

The respondent company was the proprietor of a supermarket in a pedestrian precinct. The respondent placed three parallel rows of shopping trolleys on the precinct, adjacent to the window of its supermarket. The appellant local authority prosecuted the respondent for obstruction of the highway, contrary to s.137 of the Highways Act 1980.

The magistrates found that as a matter of law there was an obstruction, which was deliberate, and for which there was no lawful authority, but that no-one had complained that the trolleys were causing an obstruction. However, the magistrates went on to consider the issue of lawful excuse, and decided that the prosecution had not proved that the obstruction was unreasonable, because (a) the trolleys were not so intrusive as to cause inconvenience to passers by; and (b) the trolleys had been placed in the precinct for the sole purpose of use by passers by who might wish to use the supermarket. The magistrates concluded that the prosecution had not proved the absence of lawful excuse, and dismissed the information.

On the prosecution's appeal by way of case stated to the High Court,

Held (allowing the appeal): (1) The magistrates had erred in placing too much emphasis upon (a) the service to shoppers which the trolleys provided, and (b) the absence of complaint of obstruction. (2) The prime requirement is always that, subject to other reasonable user, the highway must be available for passing and re-passing over its whole width.

Semble: The burden of proof of the unreasonableness of an obstruction is probably on the prosecution.

Appeal by way of case stated against a decision of Exmouth justices.

Devon County Council v. Gateway Foodmarkets Limited Q.B.D

557

JUDICIAL REVIEW

Judicial review - forum for substantive application following successful appeal against refusal of leave to apply.

The Practice Direction given on November 2, 1982, ([1982] 1 W.L.R. 1375) provides that where, in a non-criminal case or matter, the Court of Appeal grants a renewed application for leave to move for judicial review, the substantive application should be made to the Divisional Court, save where the Court of Appeal reserves the application to itself. Henceforth, save again where the Court of Appeal reserves the application to itself, the application should be set down in the Crown Office List to be heard by a single Judge, unless a Judge nominated to try cases in that list directs that the application is to be heard by a Divisional Court of the Queen's Bench Division.

Practice Direction C.A.

298

Judicial review - procedure to be followed where applicant wishes to rely on grounds other than those on which leave to move has been granted.

Following their committal for trial at the Crown Court, the applicants sought leave to apply for judicial review of the committal proceedings on a number of specified grounds. Leave to move for judicial review having been granted by the single Judge on one of the grounds, the applicants applied to the court for leave to move in respect of two of the other grounds on which they proposed to rely.

Held: An applicant for judicial review who sought to rely upon grounds specified in his notice of motion and in respect of which the single Judge had not expressly given leave, should within 21 days of the service of the notice of motion serve upon the respondent a notice specifying the other grounds he intended to rely upon. If that procedure was followed it was unnecessary for him to renew his application to the Divisional Court for the purpose of relying upon the other grounds upon which he has not specifically been given leave to move.

Renewed application: by Jonathan Howard Roberts and others for judicial review of a decision of a stipendiary magistrate.

The applicants Jonathan Howard Roberts and Michael Row appeared in person.

R. v. Bow Street Stipendiary Magistrate, ex parte Roberts and Others Q.B.D.

634

Judicial review - regulations made under Consumer Credit Act 1974 - inclusion of clause in certain advertisements required by regulations - whether ultra vires - whether unreasonable.

After a process of consultation the Secretary of State for Trade made new regulations under the Consumer Credit Act 1974 in relation to the form and content of credit advertisements. Paragraph 2 of Parts II and III of Sch.1 to the Consumer Credit (Advertisements) Regulations 1989 provide for a statement to be included in a consumer credit advertisement where the security comprises a mortgage or charge over the consumer's home as follows:

"Your house is at risk if you do not keep up repayments on a mortgage or other loan secured on it."

The applicants applied for judicial review on the basis that the regulations were *ultra vires* and unreasonable. They argued that the wording of s.44 of the 1974 Act did not authorize a mandatory warning, as s.44(2) provides that the only purpose of the regulations is to ensure that an advertisement contains a fair indication of the nature of the credit facilities offered, especially the true cost. A mandatory warning, it was also argued, could be anti-competitive and encourage potential borrowers to resort to unsecured lending. In addition, it was argued that the inclusion of the warning was irrational, as the warning might mislead consumers into believing that they cannot lose their home if they take unsecured credit, whereas this is a possibility. On application for judicial review:

Held: (1) That a warning notice of the type in question fell within the scope of the "nature of credit" within s.44 of the 1974 Act, consequently the regulations were not *ultra vires* on that ground.

(2) Section 182(2)(a) of the Act gives the Minister the power to differentiate in regulations between different types of credit and as there was no evidence of bad faith, the regulations could not be declared unreasonable.

R. v. Secretary of State for Trade and Industry, ex parte First National Bank p.Lc. Q.B.D.

402

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Held: 1. So long as the regulations made by the Secretary of State are reasonable, the fact that they are wider than those provisions expressly listed in s.44(1), they are not *ultra vires*.

2. There is nothing unreasonable or significantly misleading in the requirements of the rules under challenge. Appeal dismissed.

First National Bank plc v. Secretary of State for Trade and Industry C.A.

571

Judicial review - whether decision to grant leave to prefer a voluntary bill of indictment is susceptible to challenge by way of judicial review - s.2(2)(b), Administration of Justice (Miscellaneous Provisions) Act 1933.

A decision of a High Court Judge on an application for leave to prefer a voluntary bill of indictment is not susceptible to challenge by way of an application for judicial review.

Application for leave to apply for judicial review.

R. v. Manchester Crown Court, ex parte Williams and Simpson Q.B.D.

589

Judicial review - whether defendant is entitled to challenge decision of magistrates' court by judicial review even though right of appeal to Crown Court existed.

The defendant pleaded not guilty to an alcohol-related driving offence alleging he was not the driver. In order to substantiate that defence he wished to call two witnesses neither of whom attended at the first substantive hearing. When they failed to appear in answer to witness summonses at the adjourned hearing, the defendant applied for witness warrants to be issued. The justices refused the application and the defendant was convicted.

On application for judicial review it was submitted on behalf of the justices that as the defendant had a right of appeal to the Crown Court, the Divisional Court should not interfere by way of judicial review.

Held: Where there was an identifiable breach of natural justice in criminal proceedings before a magistrates' court, it might well be appropriate to grant judicial review even though there existed a right of appeal to the Crown Court against the justices' decision. In the present case the justices had exercised their discretion wrongly in refusing to issue witness warrants and the application would be granted.

Application: by Mark Kevin Wilkinson for judicial review of a decision of the Bradford justices refusing his application for witness warrants to be issued.

R. v. Bradford Justices, ex parte Wilkinson Q.B.D.

225

JURIES

Jury - whether Judge directing jury to return verdict of not guilty may leave available alternative offence for jury to consider - Public Order Act 1986, ss.2, 4 and 7(3).

The appellant was charged on indictment with violent disorder contrary to s.2 of the Public Order Act 1986. At the end of the prosecution case the Judge indicated that he thought the evidence against the appellant was insufficient to support a conviction against him and he would be directing the jury to find the appellant not guilty of that offence. Counsel for the appellant thereupon submitted that once the jury had, by direction of the Judge, found him not guilty, the appellant should be discharged forthwith and that the jury was no longer competent to try him under the provisions of s.7(3) of the Act for the lesser summary offence under s.4(1) thereof. He submitted that s.7(3) applied only where a jury had of its own volition, and not on the direction of the Judge, returned a verdict of not guilty to the original charge. The Judge overruled the submission and left the alternative offence for the jury's consideration. On appeal following conviction:

Held (dismissing the appeal): The verdict of a jury was no less a true verdict because it had been returned by direction of the Judge than if it had been returned by the jury of its own volition after consideration of the evidence. Once a defendant was put in charge of a jury upon indictment in a trial he remained in their charge until the jury have returned verdicts on all the offences they may properly consider or until the Judge has decided to abort the trial because of some supervening event. Whilst a defendant so remained in the charge of the jury he was liable to be tried not only on the count or counts in the indictment, but also upon any available alternative charge. Accordingly under the provisions of s.7(3) of the Public Order Act 1986 the Judge was entitled to leave the alternative lesser offence under s.4 of that Act for consideration by the jury.

Appeal: by Nicholas Craig Carson against his conviction at Teesside Crown Court of an offence under s.4(1) of the Public Order Act 1986.

R. v. Carson C.A. (Crim. Div.)

794

LANDLORD AND TENANT

Harassment of residential occupier - whether act causing harassment must be an actionable civil wrong in order to be an offence under s.1(3) of the Protection from Eviction Act 1977.

The appellant was convicted at the Crown Court on two counts of harassment against tenants who had been living in the house at the time of his purchase. None of the principal matters complained of by the tenants constituted a breach of contract on the part of the appellant. His appeal against conviction was dismissed by the Court of Appeal (Criminal Division) who certified the following point of law of general public importance:

"Whether it is necessary for an act by a landlord to be in breach of a tenant's rights in civil law in order also to be an offence under s.1(3) of the Protection from Eviction Act 1977."

Leave to appeal having been granted by the House of Lords:

Held (dismissing the appeal): An act of harassment if done with the purpose or motive of forcing a residential occupier of premises to give up his occupation did not have to be an actionable civil wrong to be an offence under s.1(3) of the Protection from Eviction Act 1977. The section, however, was not confined to the landlord and tenant relationships and the certified question would be expanded to read:

"Whether it is necessary for an act by the defendant to be an actionable civil wrong in order to be an offence under s.1(3) of the Protection from Eviction Act 1977"

and answered in the negative.

Appeal: by Alisdair David Burke from a decision of the Court of Appeal (Criminal Division) dismissing his appeal against a conviction of two offences under s.1(3)(a) of the Protection from Eviction Act 1977 at Knightsbridge Crown Court.

R. v. Burke H.L.

798

LATE NIGHT REFRESHMENT HOUSES

Opening hours of refreshment house during the night - imposition by local authority of a condition requiring house to be closed from 11 p.m. to 5 a.m. because of disturbances outside the premises - appeal to magistrates' court against imposition of condition - magistrates' exclusion of evidence of events outside the refreshment house - whether such evidence properly excluded - Late Night Refreshment Houses Act 1969, s.7.

The respondents operated premises at 43/45 High Street, Camberley within the area of the appellant council. Those premises were a "late night refreshment house" under the provisions of s.1 of the Late Night Refreshment Houses Act 1969, and were licensed by the council. There was no liquor licence in force in respect of the premises. When the licence came up for renewal, the council imposed a condition within the terms of s.7 of the Act, under which the premises were required to be closed between 11 p.m. on Fridays and Saturdays until 5 a.m. the following day. The council decided that it was desirable to impose such a condition to avoid unreasonable disturbance to residents of the neighbourhood. The respondents appealed to the magistrates' court under s.7(3) of the 1969 Act. The magistrates refused to allow evidence to be introduced on behalf of the appellant of incidents occurring outside the premises in High Street, Camberley, which might have been of questionable relevance. The council appealed.

Held: If the evidence related to events taking place outside which had no relevance to the issue the magistrates were bound to exclude it as being inadmissible. If the evidence was relevant, they should hear it and attach such weight to it as they thought fit. It was relevant and should be heard if it related to unreasonable disturbance to residents of the neighbourhood, which was attributable to the restaurant being open during the hours in question.

Appeal: by Surrey Heath Council by case stated against a decision of justices for the County of Surrey in respect of their adjudication as a magistrates' court sitting at Camberley on July 17, 1989.

Surrey Heath Council v. McDonalds Restaurants Ltd. Q.B.D.

748

LEGAL AID

Divisional Court - whether court of first instance - s.13, Legal Aid Act 1974 and s.18, Legal Aid Act 1988.

For the purposes of s.13 of the Legal Aid Act 1974, as substantially re-enacted by s.18 of the Legal Aid Act 1988, when dealing with applications for judicial review the Divisional Court is *sui generis*, being neither a court of first instance nor a court of appeal, and therefore the court has jurisdiction to make orders against the legal aid fund for the payment of an unassisted person's costs.

Application for judicial review.

R. v. Leeds Crown Court and Another, ex parte Morris and Morris Q.B.D.

385

Legal aid - criminal proceedings - need for statement of means to be furnished - whether legal aid order can operate retrospectively.

[Note: This case was decided on the basis of the statutory provisions relating to the grant of legal aid in criminal cases contained in Part II of the Legal Aid Act 1974 (as amended). The Legal Aid Act 1988 was not yet in force.]

On May 10, 1988, four of the five applicants appeared before the magistrates' court charged with false imprisonment and completed legal aid application forms giving details of their financial position. The hearing was adjourned to June 7. The information given by them, however, did not appear to correspond with a statement made by the prosecutor in opening that they jointly owned a business. Accordingly on May 11 the clerk to the justices wrote to their solicitors asking for the applicants' involvement and status in the business and a copy of the accounts. On May 18 the fifth applicant came before the court charged with a similar offence and in his application for legal aid he stated he was unemployed, whereas the court was given to understand by the prosecution that he also was involved in the business. When the five applicants came before the court on June 7 represented by counsel, and again, following an adjournment, on June 21, represented by different counsel, the issue of their financial circumstances was raised, but there were differences in recollection of what happened. The clerk to the justices was satisfied, however, that the information requested in his letter of May 11 had not been supplied, that legal aid had not been granted, and that on June 21 counsel had consented to the applicants being committed for trial on the basis that no legal aid certificate had been issued. Following the committal the clerk to the justices informed the applicants' solicitors that in the circumstances he was not prepared to further consider the question of legal aid for the proceedings before the justices and he doubted whether he had power to grant legal aid retrospectively.

On application for judicial review it was submitted, *inter alia*, on behalf of the applicants that by June 21 legal aid should have been granted before the committal proceedings were concluded and could and should have been back-dated to the date of the application.

Held (dismissing the application): 1. Following the decisions in *R. v. Rogers* [1979] 1 All E.R. 693 and *R. v. Gibson* [1983] 1 W.L.R. 1038, work carried out by counsel or solicitors in connexion with criminal proceedings in a magistrates' court was not work done under a legal aid order if it was done before the order was made unless and to the extent that the deeming provision was applied under reg.4(2) of the Legal Aid in Criminal Proceedings (Costs) Regulations 1988 (formerly reg.3A of the Legal Aid in Criminal Proceedings (Costs) Regulations 1982). That provision, however, was limited to cases where, in the interests of justice, the earlier work was done as a matter of urgency.

2. Section 29(4) of the Legal Aid Act 1974 provided that before a legal aid order could be made a written statement of means in the prescribed form was required, and s.29(2) of the Act provided that a court shall not make a legal aid order unless it appeared to the court that the applicant's disposable income and disposable capital were such that he required assistance in meeting the costs which he might incur. [See now ss.21(5) and 21(6) of the Legal Aid Act 1988 for corresponding provisions].

The court refused to certify that the case involved a point of law of general public importance.

Application: for judicial review of a decision of Newham justices refusing applications for legal aid orders in criminal proceedings.

R. v. Newham Justices, ex parte Muntaz and Others Q.B.D.

597

LICENSING

Application for justices' on licence free from conditions - application refused by licensing committee - appeal to Crown Court - substantial number of witnesses for appellant many not cross-examined by counsel for justices - the objectors before committee not pursuing objections in Crown Court - appeal dismissed with no reasons given for decision - decision of Crown Court unreasonable - Licensing Act 1964, ss.3, 21.

In April 1987, Joseph Ellwood applied for and was granted an on licence in respect of premises comprising part of an extensive site at Bedale, North Yorkshire. The licence was granted subject to two conditions which were acceptable to Mr. Ellwood at that time. After that grant a considerable demand for the facilities provided made it appropriate for Mr. Ellwood to apply for a licence without the two conditions. He made application to the local licensing committee and the applicant and four witnesses were called in support of the application. There were two objectors, but the police did not object. The licensing justices refused the application. Mr. Ellwood appealed to the Teesside Crown Court, and there he gave evidence supported by 12 witnesses. Many of them were not cross-examined by counsel for the justices, and neither of the objectors before the committee pursued their objections in the Crown Court. The Crown Court dismissed the appeal, but gave no reasons other than to express the view that the justices had been right. Mr. Ellwood applied to the Divisional Court for an order of judicial review.

Held: If a Crown Court intended to dismiss an appeal and to reach a conclusion in a case where there was no evidence led against the appellant's case, and to reject evidence given by the appellant and witnesses called on his behalf, it was incumbent upon the Crown Court to give cogent reasons for rejecting that evidence and for reaching a conclusion adverse to that appellant's case. The decision of the Crown Court was unreasonable within the terms of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 112 J.P. 55 and would be quashed.

Appeal: by the applicant Joseph Colin Proctor Ellwood for an order of judicial review by way of an order of certiorari from a decision by the Crown Court at Teesside not to allow an appeal from the refusal of the licensing committee of Hang West to grant a justices' on licence free from conditions.

R. v. Teesside Crown Court, ex parte Ellwood Q.B.D.

496

Application for the transfer of justices' on licence for restaurant - applicant had held protection orders in respect of the premises - applicant's husband on previous occasion found not to be fit and proper person - police inform committee that applicant has no previous convictions and has ten years' experience in licensing trade - justices retire and after discussion purport to grant transfer to applicant but state that premises must remain closed in the evening - justices advised licence unrestricted as to time - further discussion by justices, then application for transfer refused - Licensing Act 1964, ss.3, 8 and Part IV.

The applicant, Freda Papaspyrou, sought to have transferred to her the Part IV licence in respect of the MacDonalds premises at 17/18 King William Walk, Greenwich SE10. An earlier application for transfer made by the applicant's husband had been refused on the basis that he was not a fit and proper person. The applicant had then from time to time been granted protection orders on condition that her husband should not be concerned in the selling or dispensing of liquor. At the hearing before the committee on April 18, 1989 the history of the matter was recited. The police were content with the arrangements. The applicant had no previous convictions, and she had ten years' experience in the trade. At the close of the application, the licensing justices retired. Upon their return, the applicant was told that the transfer would be granted but that the arrangements subsisting since the grant of the protection order would continue and that "you must remain closed in the evening". It was pointed out by counsel and the clerk that the licence was unrestricted as to time, and a restrictive condition as to time could not be imposed. The justices then deliberated further and concluded that the transfer should be refused. The applicant appealed, contending that implicit in the decision of the committee to grant a licence as to time was the finding that the applicant was a fit and proper person.

Held: There was a real possibility of some element of confusion at the hearing on April 18, in that the committee thought it could take a lenient view and grant a limited licence just for lunchtime, whereas it would not have been willing to grant a transfer to be effective in both daytime and evening periods. The refusal of the committee would be quashed and mandamus would go directing the application to be reheard by a differently constituted committee as soon as possible.

Appeal: by the applicant, Freda Papaspyrou, for an order of judicial review of a decision of the licensing committee for the Inner London Area South Eastern Division to refuse the transfer of an on licence.

R. v. Licensing Committee for the Inner London Area, ex parte Papaspyrou Q.B.D.

544

Appeals - meaning of "person aggrieved".

Licensing - hackney carriages - whether a local authority which revokes licences is "a person aggrieved" by a decision of a magistrates' court to allow an appeal against revocation - Local Government (Miscellaneous Provisions) Act 1976.

The appellant held licences as the owner and driver of a hackney carriage. The respondent local authority revoked both licences. The appellant appealed to the magistrates' court, which allowed his appeal, and ordered the local authority to pay him £100 by way of costs. The local authority appealed to the Crown Court, which allowed the appeal. The appellant then appealed by way of case stated to the High Court, where the issue was confined to the question of whether or not the local authority had had any right of appeal to the Crown Court against the adverse decision of the magistrates' court. The answer to this question depended on whether or not the local authority was "a person aggrieved" by the magistrates' court's decision.

In the High Court, Simon Brown, J. felt constrained by a line of authority, beginning with *R. v. London Quarter Sessions, ex parte Westminster Corporation* (1951) 115 J.P. 350; [1951] 2 K.B. 508, to dismiss the appeal on the limited ground that the local authority was "a person aggrieved" because of the order for costs, although if there had been no such order, his decision would have been that the local authority was not "a person aggrieved".

On appeal to the Court of Appeal.

Held (dismissing the appeal): (1) In order to conclude that a party to proceedings is "a person aggrieved" by the decision in those proceedings, it is sufficient that the decision is against that party, and it is not necessary also to show that the decision places a burden on him; therefore (2) the local authority was "a person aggrieved", irrespective of the order for costs, with the result that it had a right of appeal to the Crown Court; furthermore (3) the case of *R. v. London Quarter Sessions, ex parte Westminster Corporation* was wrongly decided; therefore (4) all cases in which that decision has been followed should be treated with considerable reserve; and (5) although whether or not those cases following *R. v. London Quarter Sessions, ex parte Westminster Corporation* should be considered to have been wrongly decided must depend on the individual circumstances of each case, as a general principle, and except for criminal cases which come within a special category, and other cases where the decision against the local authority can be regarded as being an acquittal, the normal result of re-examining those cases should be that a public authority is entitled to be treated as "a person aggrieved" where it is subject to an adverse decision in an area where it is required to perform public duties.

Appeal against a decision of Simon Brown, J., sitting in the Queen's Bench Division of the High Court.

Cook v. Southend Borough Council C.A.

145

MAGISTRATES

Appeals - whether magistrates have power in civil proceedings to state a case for the opinion of the High Court before finally determining the question before them - Magistrates' Courts Act 1980.

The applicants were the tenants of the ground, first and second floors of a property which also included a self-contained basement flat. The local fire authority issued a prohibition notice in purported exercise of its powers under s.10 of the Fire Precautions Act 1971, restricting occupation to the ground floor and basement only.

The applicants successfully applied to the magistrates' court for a direction that the prohibition order be suspended pending the hearing of an appeal. On the hearing of the appeal, the applicants argued as a preliminary point, that by virtue of s.2(e) of the 1971 Act, the local fire authority had had no power to issue the notice because the notice related to "premises consisting of or comprised in a house ... occupied as a single private dwelling". The local fire authority argued that the basement flat was part of the house, and that therefore s.2(e) did not apply.

The question then arose as to whether, at that stage in the proceedings, the magistrates had power to state a case for the opinion of the High Court. The magistrates, having been advised by their clerk that they had no power to state a case, decided that, even if they had had the power, they would have declined to exercise it.

On an application for judicial review, the Queen's Bench Division of the High Court.

Held (dismissing the application): (1) The principle that in criminal proceedings the magistrates cannot state a case for the opinion of the High Court until they have made a final determination on the matter before them, does not apply in civil proceedings. (2) However, when deciding whether or not to accede to a request to state a case for the opinion of the High Court at an interlocutory stage in civil proceedings, the magistrates have to exercise a discretion, and they are not subject to s.111(5) of the Magistrates' Courts Act 1980, which in other circumstances effectively obliges the magistrates to state a case unless they are of the opinion that the request to do so is frivolous. (3) Nevertheless, (a) the magistrates' discretion to state a case at an interlocutory stage of civil proceedings should be exercised sparingly and only in exceptional circumstances; and (b) on the facts of the present case it would be inappropriate to direct the magistrates to state a case, because (i) there were no exceptional circumstances, and (ii) the magistrates could be relied upon to use commonsense when making their decisions, both as to the modifications which ought to be made to the prohibition

order, and as to further suspending the operation of the order in such a way as to enable the legal issues to be tested again in the High Court.

Application for judicial review of a refusal of the Chesterfield justices to state a case for the opinion of the High Court.

R. v. Chesterfield Justices, ex parte Kovacs and Another Q.B.D.

1023

Bail offence - whether information for failure to surrender to bail granted by police subject to six months' time limit.

On May 18 and 22 and January 15, 1988, the appellant, having been granted bail in each case by the police, failed to surrender to custody at the three magistrates' courts concerned, and in each case a bench warrant without bail was issued. He was arrested and remanded by one of the courts on September 5, 1988, and on September 9, 1988, informations for offences under s.6(1) of the Bail Act 1976 were laid in respect of all three abscondings. He was later sentenced for all the original offences but in relation to the bail offences it was submitted on his behalf that the justices had no jurisdiction because the informations laid were time-barred by s.127(1) of the Magistrates' Courts Act 1980. The justices rejected the submission being of opinion that no time limit applied to an offence under s.6(1) of the 1976 Act having regard to the decision in *Schiavo v. Anderton* (1986) 150 J.P. 264; (1986) Cr. App. Rep. 228 and *Practice Direction (Bail: Failure to Surrender)* (1987) 84 Cr. App. R. 137. The appellant then pleaded guilty to the three bail offences and was sentenced.

Held: The *Practice Direction* (*supra*) (which had been issued to clarify the guidance given by the Divisional Court in *Schiavo v. Anderton* (*supra*)) drew a distinction between failure to surrender to bail granted by the police and failure to surrender to bail granted by a magistrates' court, and provided that in the former case the procedure should be by charging the accused or by the laying of an information.

Section 6(1) of the Bail Act 1976 created one offence of failing to surrender to custody. In the case of failure to surrender to a police station or to a magistrates' court where bail had been granted by the police, the matter must be dealt with as a summary offence as provided in the *Practice Direction* and the information laid was subject to the six months' time limit provided in s.127(1) of the Magistrates' Courts Act 1980.

The case of failure to surrender to a magistrates' court where bail had been granted by a magistrates' court did not arise in the present case, but, *obiter*, on the basis of *Schiavo v. Anderton* (*supra*) and the *Practice Direction* it would be dealt with by the magistrates' court as if it were a contempt and would be subject to no time limit.

Appeal allowed and case remitted to the magistrates' court with a direction to dismiss the three charges under the Bail Act.

Appeal: by way of case stated by the Canterbury and St. Augustine's magistrates' court against the conviction of Michael Ronald Murphy under the Bail Act 1976.

Murphy v. Director of Public Prosecutions Q.B.D.

467

Committal proceedings - abuse of the process of the court arising from substantial delay in prosecution - whether prejudice and unfairness can be presumed - whether delay in serving notice under reg.7 of the Police (Discipline) Regulations 1985 on police defendants a relevant consideration.

These cases relate to applications for judicial review of conflicting decisions concerning abuse of the process of the court made by two metropolitan stipendiary magistrates in committal proceedings and were dealt with together. In the first case the application was by the Crown for an order quashing a decision of Mr. Bartle who refused to hear committal proceedings against police sergeant Goodger and five police constables on a charge that between January 23 and February 8, 1987, they conspired together to pervert the course of justice. In the second case the application was by the defendant police constable Cherry for an order quashing a later decision of Mr. Weeks that committal proceedings against him on a charge of unlawful wounding on January 24, 1987 were not an abuse of the process of the court and could proceed.

The facts common to both cases were as follows:

The prosecutions arose out of scenes of violent disorder which took place at Wapping on January 24, 1987, during a printing dispute when a demonstration of 12,000 to 15,000 people was attended by about 1,200 police officers amid well-founded fears of wholesale breaches of the peace. The police made many arrests and were themselves the subject of over 500 complaints of misconduct from 185 people. The complaints were referred to the Police Complaints Authority whose investigations were complex and prolonged, and resulted in some officers being disciplined and others charged with criminal offences. Committal proceedings had been held in the two cases now before the Divisional Court and others were pending.

On December 17, 1987, a notice in general form under reg.7 of the Police (Discipline) Regulations 1985 was served on all the officers under investigation including the defendants in both committal cases, but it was not until

February 1988 that they received formal specific notice of the allegations against them and were interviewed. The delay in serving those notices was the result of a policy decision taken early in the investigation.

No further information was given to the defendants until January 1989 when summonses were issued against them.

In the case of Goodger there was sufficient *prima facie* evidence available by June 1987 to charge all the six officers and in the case of Cherry all the *prima facie* evidence was available by April 14, 1987.

At the committal proceedings against Goodger and his co-defendants on May 3, 1989, Mr. Bartle upheld a submission by defence counsel that the substantial delay in the prosecution constituted an abuse of the process of the court and declined jurisdiction. The committal proceedings against Cherry came before Mr. Weeks on May 23, 1989, and he refused an application to adjourn the case made on the basis that an application for judicial review was pending in the Goodger case. He accepted that the delay of 13 months in the service of the specific reg.7 notice was extreme but held that it was justified having regard to the complexity of the whole inquiry and there was no prejudice.

Held (dismissing the application in the Goodger case and quashing the decision in the Cherry case): 1. A decision of a magistrates' court on the issue of abuse of process could be challenged by judicial review.

2. In criminal proceedings mere delay which gave rise to genuine prejudice and unfairness might by itself amount to an abuse of the process of the court. In some circumstances prejudice could be presumed from substantial delay and it would be for the prosecution to rebut, if it could, the presumption. In the absence of a presumption where there was substantial delay it would be for the prosecution to justify it.

3. In the case of a prosecution against a police officer, the circumstances of the service of a notice under reg.7 of the Police (Discipline) Regulations 1985 was a most material matter which the magistrates' court was entitled to take into account.

4. Although the two cases differed to some extent as to the nature of the offences alleged, the detailed chronology and the evidence of prejudice, essentially similar considerations nevertheless arose as to the nature and duration of the delay and the attempt to justify it. The common thread was essentially whether the first period of delay up to February 1988 could be said to be justified and the extent to which it was proper to infer prejudice from the mere passage of time. In both cases there was extreme delay from which prejudice could be properly inferred.

Application: for judicial review of the decisions of two metropolitan stipendiary magistrates in committal proceedings on the issue of the abuse of the process.

R. v. Bow Street Stipendiary Magistrate, ex parte Director of Public Prosecutions and R. v. Bow Street Stipendiary Magistrate, ex parte Cherry Q.B.D.

237

Committal proceedings based on written statements - need for explicit objection to be made to exclude statements - Magistrates' Courts Act 1980, s.102; Magistrates' Courts Rules 1981, r.6(2).

The defendant appeared before examining justices on a charge of assault occasioning actual bodily harm. After the service of the committal papers on his solicitor but before the committal proceedings, the solicitor had informed the Crown Prosecution Service that three of the 19 prosecution witnesses being tendered in evidence and no inquiry was made by the court under r.6(2) of the Magistrates' Courts Rules 1981 as to whether the defendant wished to object to them being so tendered. There was, however, a common understanding that if the attendance of a witness was required for examination, then that was tantamount to an objection under s.102 of the Magistrates' Courts Act 1980 and under r.6(2). The prosecution declined to call the witnesses for examination and the justices committed the defendant for trial under s.6(2) of the Act on the totality of the written statements including those of the three witnesses.

Held (granting an order of certiorari): If there was an objection to a written statement being tendered in evidence by the prosecution then it could not be admitted in evidence under s.102 of the Magistrates' Courts Act 1980 and in that situation the prosecution would have to decide whether they would proceed without the benefit of that statement or whether they wished to have an oral committal under s.6(1) of the Act.

There was the clearest possible distinction between objecting to a statement being tendered in evidence and requiring the person who made the statement to attend the committal proceedings for examination. The proposition that if the attendance of a witness was required for examination then that was tantamount to an objection under s.102 was entirely wrong.

Application: for judicial review of committal proceedings conducted by Holyhead justices against Richard Rowlands.

R. v. Holyhead Justices, ex parte Rowlands Q.B.D.

84

Compensation order - extent of personal injuries in dispute - whether court may make order in absence of evidence.

The applicant pleaded guilty before a magistrates' court to assault occasioning actual bodily harm. The prosecuting solicitor told the justices that the victim had sustained two broken teeth and a fractured nose with bruising around the face but called no evidence in support. The extent of the injuries was disputed by the defence solicitor who objected to an adjournment for further information to be obtained. The applicant was fined £150 and ordered to pay £1,250 compensation.

Held (quashing the compensation order): Justices were not entitled to make a compensation order in respect of personal injuries where the extent of the injuries was in dispute and no evidence was called by the prosecution to prove the injuries.

Application: by David Andrew Jones for judicial review of a compensation order made against him by the Chorley justices.

R. v. Chorley Justices, ex parte Jones Q.B.D.

420

Jurisdiction - joint offenders charged with offence triable either way - whether, when one elects trial by jury, all must be committed for trial even though others consent to summary trial.

The applicant together with C and W were charged jointly with affray, an offence which was triable either way. Under the mode of trial procedure the prosecutor submitted that the case was suitable for summary trial and the solicitor representing the applicant and C agreed, the solicitor of W making no representations on that issue. The justices decided that the matter was suitable for summary trial and when the defendants were put to their election, W elected trial by jury and the applicant and C consented to summary trial. No pleas were taken but the justices were informed that all pleas were not guilty. The prosecutor invited the justices to reconsider the mode of trial and, following further submissions, the justices retired and on their return they said they agreed "with the age old custom and practice whatever the words of the statute might say" and would commit all the defendants for trial. The case was then adjourned. On application for judicial review to quash the decision and order the justices to try the applicant summarily:

Held (refusing the application): Where a number of defendants in a magistrates' court were charged with one offence and one of them elected to be tried upon indictment, then, although one or more of the others consented to summary trial, all the defendants had to be committed for trial.

Once the justices had reached a decision under s.19 of the Magistrates' Courts Act 1980 that the offence was suitable for summary trial, they had no authority to reconsider that decision, but must proceed to determine where the defendants shall in fact be tried under the procedure outlined in s.20. The words "the accused" in s.20(2) and (3) applied to the person accused of the offence referred to in s.19 and s.20(1) and where, as in the present case, more than one person was accused, the words included the plural by virtue of s.6(1) of the Interpretation Act 1978. Accordingly, "the accused" in s.20(3)(a) and s.20(3)(b) meant all the accused charged with the offence.

Application: for judicial review of a decision of the Brentwood justices.

R. v. Brentwood Justices, ex parte Nicholls Q.B.D.

487

Magistrates - offence triable either way - court directs trial on indictment - whether subsequent court entitled, before commencement of committal proceedings, to review mode of trial and deal with the case summarily.

On February 17, 1988, the defendant, who was not legally represented, appeared before the magistrates' court charged, *inter alia*, with reckless driving. The prosecution applied for trial on indictment and the justices, having complied with the mode of trial procedure set out in the Magistrates' Courts Act 1980, decided that the case was more appropriate for such a trial and adjourned it for committal proceedings. At an adjourned hearing, before different justices, on August 15 the defendant was represented by a solicitor who, before the commencement of the committal proceedings, invited the justices to reconsider the mode of trial and made a submission in favour of summary trial. The prosecution resisted the application and submitted that the justices had no jurisdiction to overrule the earlier decision except under the provisions of s.25 of the Act which applied only after the committal proceedings had commenced. The justices accepted jurisdiction to which the defendant consented and pleaded guilty.

Held: The justices had no jurisdiction to change the mode of trial from committal proceedings to summary trial except in accordance with the provisions of s.25(3) of the Magistrates' Courts Act 1980. The court doubted whether there

was power to review a decision for trial on indictment before committal proceedings had commenced (as had been suggested *obiter* in *R. v. Newham Juvenile Court, ex parte F* (1987) 151 J.P. 690; [1986] 1 W.L.R. 939). However, if that power existed at all, it could only arise where there was a change of circumstances since the original decision had been taken or where the circumstances existing at the time of the previous hearing were not then drawn to the attention of the court. That was not the position in the present case.

Accordingly, the decision of the justices on August 15 to alter the earlier decision as to the mode of trial was a nullity as was the defendant's plea of guilty. The case would be remitted to the magistrates' court to continue with the committal proceedings.

Application: by the prosecution for judicial review of decisions of the Liverpool City magistrates' court relating to the mode of trial.

R. v. Liverpool Justices, ex parte Crown Prosecution Service Q.B.D.

1

Witness summons - meaning of "likely to be able to give material evidence" - witness must be material to the party calling him - Magistrates' Courts Act 1980, s.97(1).

Arising out of a demonstration during a cricket match at Lord's against a projected cricket tour of South Africa, a number of defendants were charged with a breach of the peace. That charge was later withdrawn and a charge under s.5(1) of the Public Order Act 1986 substituted and the case was set down for hearing on January 25 and 26, 1990. On application being made on behalf of the defendants for witness summonses to be issued against Mr. Gatting and Mr. Emburey who were playing in the cricket match, the stipendiary magistrate adjourned the proceedings for further information about what the prospective witnesses could recall. At the adjourned hearing on January 15, the defendants' solicitor gave details of the information he had gathered from the two cricketers on the telephone and the magistrate issued the witness summonses. On application for an order of certiorari to quash the summonses:

Held (granting the application): A person applying for a witness summons under s.97(1) of the Magistrates' Courts Act 1980 must demonstrate that the person whose attendance he was seeking was a witness material to his case. It was not sufficient that the prospective witness could give evidence of what he saw or heard of an incident leading to the criminal proceedings. The evidence must be material to the case of the litigant, be he prosecuting or defending, making the application.

In the present case, the evidence which, on the basis of the information given to the magistrate, could be given either by Mr. Gatting or Mr. Emburey was not material in that context.

Application: for judicial review of a decision of the Marylebone magistrates' court granting an application for witness summonses to be issued.

R. v. Marylebone Magistrates' Court, ex parte Gatting and Emburey Q.B.D.

549

OATHS

Oaths - meaning of "the oath shall be administered in any lawful manner" in Oaths Act 1978, s.1(3).

The applicant was convicted by the verdict of a jury of having a firearm with intent to commit an indictable offence. On application for leave to appeal against conviction, the sole ground of his application was that the main prosecution witness, who was a Muslim by religious conviction, took the oath using the New Testament before he gave evidence. Counsel for the applicant submitted that as the witness was not properly sworn, there was a material irregularity and the conviction accordingly was in any event unsafe and unsatisfactory.

Held (refusing the application): In relation to a witness who was not a Christian nor a Jew, the question of whether the administration of an oath was lawful under s.1(3) of the Oaths Act 1978 did not depend upon what might be the considerable intricacies of the particular religion adhered to by the witness, but on the following two matters only:

- (1) whether it was an oath which appeared to the court to be binding on the conscience of the witness and
- (2) if it was, whether it was an oath which the witness himself considered to be binding on his conscience.

In the present case the Court of Appeal, having heard the witness, duly sworn on the Koran, give evidence that he considered an oath taken by him upon the Koran or upon the Bible or upon the Torah, to be binding on his conscience, was satisfied that he was properly sworn at the trial.

Application: by Peter Kemble for leave to appeal against his conviction at the Central Criminal Court.

R. v. Kemble C.A. (Crim. Div.)

593

PROCEDURE

Procedure - absence of prosecution witnesses - short adjournment for their attendance - dismissal of informations on their failure to do so - whether breach of natural justice.

Both cases raised similar points and were dealt with together in the Divisional Court.

In the first case when the trial was called on for hearing at 10.10 a.m. the two prosecution witnesses, both policemen, were not present and the prosecutor told the justices that he did not know why. He asked for a short adjournment and in granting it the justices stated that no more than ten minutes would be allowed. The prosecutor made inquiries and spoke to one of the officers as a result of which he informed the justices that there must have been some misunderstanding between the C.P.S. and the police and asked for the case to be put back until 11 a.m. so that the witnesses could attend. After a short retirement the justices refused the application and ordered that the case should proceed and then dismissed the information as the prosecutor was unable to call any evidence. The case was over by 10.35 a.m.

In the second case both the chief prosecution witness and the defendant failed to attend. The justices were warned that both sides were in difficulty and they agreed not to sit until 10.15 a.m. and then put the case back for a further 15 minutes, at which point the prosecutor applied for a bench warrant against the absent defendant. The justices refused the application and, having ordered the case to proceed, then dismissed the information when no prosecution evidence was available.

In each case it was argued that there was a clear breach of the rules of natural justice and that the justices had acted too hastily.

Held: It was often a mistake to lay down rigid principles as to the way in which a court should exercise its discretion to conduct the proceedings before it. The principle which should always guide justices was that they must take care to observe the interests of fairness towards both sides. The public had an interest in ensuring that properly brought prosecutions were properly conducted in court just as much as the defendant was entitled to present his case to the fullest advantage. In each of the cases the justices erred in good faith in failing to follow the principles of natural justice when insisting that the case should proceed and then in dismissing it. The court, however, was not laying down any rigid formula by which justices should be guided in exercising their discretion. Each case was different and must be decided on its own facts.

Per Mustill, L.J.: "In the context of adjournments the justices will, in order to maintain [the] balance of fairness, wish to take into account all the circumstances including the practicability to one side or the other of putting forward his or her case adequately if the adjournment is refused. The court will also want to consider questions such as the passage of time, also whether this is the first or only one of many occasions on which an indulgence by way of adjournment has been requested, and also whether the party asking for the adjournment is in fault in not being in a position to proceed at once. I emphasize in relation to the latter consideration that it is only one of the factors to be taken into account. The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the court shall have the best opportunity of giving the fairest available hearing to the parties."

Declaration that in each case the justices had acted in breach of natural justice by refusing the adjournment. *Quare* whether, having regard to the present conflict-case law, the court would have had power to quash the two acquittals and direct re-trials had it wished to do so.

Applications: by the Director of Public Prosecutions for judicial review of decisions of the Swansea justices in cases against Desmond William Davies and Geoffrey Phillips.

R. v. Swansea Justices and Davies, ex parte Director of Public Prosecutions, Q.B.D.

R. v. Swansea Justices and Phillips, ex parte Director of Public Prosecutions Q.B.D.

709

Procedure - absence of vital defence witness - justices not informed of the relevance of his evidence and refuse adjournment - defence advocate withdraws from case - whether justices entitled to convict on unchallenged prosecution evidence.

The two applicants appeared before the magistrates' court charged with assault and kindred offences. The case had been adjourned a number of times. At the hearing defence counsel informed the justices that he was not in a position to proceed because a vital witness was not available. When the justices refused a further adjournment defence counsel

indicated that he proposed to apply for a judicial review and would take no further part in the hearing. The justices proceeded to hear the prosecution case which was unchallenged as defence counsel felt he was in no position to cross-examine, and convicted the applicants.

At the hearing of the application for judicial review the Divisional Court had the benefit of seeing the proof of evidence of the absent witness from which it was obvious that his evidence would have been extremely relevant and important.

Held: When an application was made to justices for an adjournment on the ground that an essential defence witness was absent and the defence advocate did not inform the court of the sort of evidence the absent witness could give, their clerk must make such inquiries so that the court could be informed about the kind of support which the defence would be denied if no adjournment was granted.

Application: by Emrys Hughes and Cledwyn Hughes for judicial review of their conviction by the Bracknell justices.

R. v. Bracknell Justices, ex parte Hughes and Another Q.B.D.

98

Procedure - appeal against conviction based on defective information - whether Crown Court may amend the information or proceed without amendment - relevance of s.123 of Magistrates' Courts Act 1980.

The applicant was convicted at the magistrates' court of four road traffic offences on an information which incorrectly alleged the offences were committed on February 28, 1988, whereas the actual date was February 27, 1988. The mistake was not noticed by anyone at the magistrates' court but was brought to the attention of the Judge at the Crown Court at the hearing of the applicant's appeal against conviction. Following argument as to whether the Crown Court had jurisdiction to amend the information, counsel for the Crown submitted that the appeal could proceed without such amendment having regard to s.123 of the Magistrates' Courts Act 1980 (relating to defect in process at the magistrates' court) which applied to appeals from the magistrates' court to the Crown Court. The Judge accepted that on the authorities he had no power to amend the information but rejected the submission of counsel on the ground that it was self evidently objectionable to proceed on an information known to be wrong as to the date. He considered that it would be appropriate to deal with the merits of the appeal and accordingly he allowed the amendment to the information. On application for judicial review:

Held: 1. It was well settled by case law that the Crown Court dealing with an appeal from a magistrates' court had no jurisdiction to amend the information laid before the magistrates' court.

2. The power of the Crown Court to deal with an appeal from a magistrates' court based on a defective information without amendment was the same as the power available to the magistrates' court under s.123 of the Magistrates' Courts Act 1980 in relation to the summary proceedings. In the present case the factual situation was that the wrong date in the information was considered to be of no materiality whatsoever - it did not affect the resolution of any of the issues and caused no injustice to the applicant. Had the justices noticed the mistake they could have dealt with the information without amendment. Likewise the Crown Court could proceed using the same power.

Accordingly the decision of the Judge to amend the information would be quashed and the Crown Court ordered to continue the hearing upon the information unamended.

Application: by David George Stacey for judicial review of a decision of Swansea Crown Court on his appeal against conviction by Neath magistrates' court.

R. v. Swansea Crown Court, ex parte Stacey Q.B.D.

185

Procedure - appeal against sentence imposed at Crown Court - Judge must comply with procedure set out in Practice Note (Crown Court - Bail Pending Appeal) [1983] 3 All E.R. 608.

The appellant pleaded guilty at the Crown Court to two offences under s.167(1) of the Customs and Excise Management Act 1979. He was sentenced on each count to three months' imprisonment, concurrent, and fined £3,000 and was also ordered to pay £250 costs. The recorder granted a certificate giving leave to appeal against sentence and allowed bail pending the appeal.

Held: The attention of the profession and indeed recorders and Judges up and down the country was directed to the *Practice Note (Crown Court - Bail Pending Appeal)* [1983] 3 All E.R. 608 which stated "A Judge should not grant a certificate with regard to sentence merely in the light of mitigation to which he has in his opinion given due weight."

In the present case that *Note* was not observed and the appeal came before the court pursuant to an inappropriate procedure. The proper process for anyone dissatisfied with a sentence was to lodge an application for leave to appeal which would be considered by the single Judge.

On the merits of the present appeal the prison sentences would be quashed and the rest of the penalty imposed would stand.

Appeal: by David Roger Hescroff against sentences imposed at Ipswich Crown Court.

R. v. Hescroff C.A. (Crim. Div.)

1042

Procedure - appeals - application to justices to state a case - application sent by post - when is application made? - Magistrates' Courts Act 1980 and Magistrates' Courts Rules 1981.

(1) Where an application is made to the justices to state a case for the opinion of the High Court, and the application is sent by post, the application is made when it is posted, provided that in the normal course of the post it would be received within the 21 day period prescribed by s.111(2) of the Magistrates' Courts Act 1980, even though in fact it is received outside that period.

(2) Where an application to the justices to state a case for the opinion of the High Court is made out of time, that application does not preclude the possibility of a subsequent appeal to the Crown Court.

Appeal by way of case stated from a decision of the Crown Court sitting at Chester.

P & M Supplies (Essex) Ltd. v. Hackney Borough Council Q.B.D.

814

Procedure - application to extend defendant's custody time limit - non-compliance with notice requirement under reg.7 of the 1987 Regulations - whether court may nevertheless extend time limit under authority of s.22(3) of the Prosecution of Offences Act 1985.

The applicant appeared before the justices on May 6, 1989, charged with rape and other offences. The initial custody time limit of 70 days was due to expire on July 14. Following a number of remands in custody the applicant agreed on July 6 to the time limit being extended to July 26 waiving the requirement for two days' notice to be given to him under reg.7(2) of the Prosecution of Offences (Custody Time Limits) Regulations 1987. By July 26 the prosecution had still not served the committal papers and had not given notice of the application for a further extension of the custody time limit which they then made, inviting the justices to direct under reg.7(4) that no prior notice need be given on the ground that it was impracticable to give it. The applicant's solicitor resisted the application and submitted (1) that as the existing time limit had already expired at 10 a.m. that day, it was too late to seek a further extension and (2) that it had been perfectly practicable for the prosecution to have served a reg.7(2) notice. The justices overruled the submissions and extended the custody time limit to August 2. On a motion for *habeas corpus*:

Held: 1. Under reg.7(4) of the 1987 Regulations the question as to whether it was practicable for the prosecution to give advance notice of their intention to apply for an extension of the custody time limit, had to be considered not as at the time when the matter was raised before the court, but against the whole background of the case. In the present case the justices could not properly have been satisfied of the impracticability for the purposes of reg.7(4) and so had no discretion to waive the notice period.

2. As a matter of construction the notice requirements under reg.7(2) governing an application to extend the custody time limit were, however, directory and not mandatory, and did not limit the plain statutory power conferred by s.22(3) of the Prosecution of Offences Act 1985 itself, namely to extend the time limit at any time before its expiry. Accordingly notwithstanding the prosecution's non-compliance with reg.7, the justices were entitled to extend the applicant's custody time limit as they did.

3. Under the Regulations all custody periods began at the close of the day during which a defendant was first remanded and expired at the relevant midnight thereafter.

4. The standard of proof to be applied in relation to the court being "satisfied" of the various matters under s.22(3) and reg.7(4) was that of the balance of probabilities and not beyond reasonable doubt.

Application: for *habeas corpus* following a decision of Ramsgate justices extending the applicant's custody time limit.

In re C Q.B.D.

137

Procedure - delay in laying information as an abuse of the process of the court - Food Act 1984.

The appellant local authority alleged that on July 5, 1988 the respondent had sold a mouldy pork pie, contrary to s.8(1) of the Food Act 1984. Section 95(1) of the Act required that, in the circumstances of the case, any prosecution must be commenced within one year. The information was laid on April 7, 1989, and the respondent was not told of the identity of the complainant until advance disclosure took place in May 1989.

The case was listed for summary trial on August 3, 1989, when the magistrates upheld a submission on behalf of the defendant that the delay had been unreasonable and unjustifiable and that it amounted to an abuse of the process of the court, even though it was accepted that there had been no *mala fides* on the part of the local authority, and that the information had been laid within the statutory time limit. As a subsidiary factor, the magistrates were also influenced by the anxiety, uncertainty and distress which the delay had caused to the defendant.

On the local authority's appeal by way of case stated,

Held (dismissing the appeal): The magistrates were entitled to conclude that the delay, and in particular the delay in informing the defendant of the complainant's identity, was prejudicial to the defence, and was therefore an abuse of the process of the court. However, the magistrates' subsidiary reason for their decision, namely the defendant's anxiety, uncertainty and distress, was not a relevant factor at that stage, although it could become so if and when the case had proceeded to the sentencing stage. Accordingly, if the defendant's anxiety, uncertainty and distress had been the sole or main reason for the magistrates' decision, the appeal would have been allowed.

Appeal by way of case stated.

Daventry District Council v. Olins Q.B.D.

478

Procedure - dismissal of information following defence submission that prosecution evidence would be tainted unfairly against defendant.

The defendant was charged with driving a motor vehicle without due care and attention. In the precincts of the magistrates' court before the hearing, the defendant saw two police witnesses in conversation with a defence witness on two occasions, one of which was in the presence of the prosecuting solicitor. At the trial the justices accepted a submission by the defendant's solicitor that as a result of those conversations the police officers' evidence would be tainted unfairly against the defendant and, without hearing any evidence, dismissed the case.

Held: By virtue of s.9(2) of the Magistrates' Courts Act 1980 justices have no jurisdiction to reach a final decision on an information before them without hearing such evidence as the parties wished to adduce and such submissions as they wished to make.

In the present case it was difficult to understand how the justices could have reached the conclusion that the evidence was tainted unfairly against the defendant without hearing any evidence from the witnesses concerned. In acting as they did the justices breached their statutory duty and their decision was a nullity.

Order of mandamus granted and case remitted for hearing before a differently constituted bench.

Application: by the prosecution for judicial review of a decision of the Dorchester magistrates' court dismissing an information against Donald Edward Walden.

R. v. Dorchester Magistrates' Court, ex parte Director of Public Prosecutions Q.B.D.

211

Procedure - prosecution costs in proceedings under s.12 of the Magistrates' Courts Act 1980 - duty of justices' clerk to bring written application for such costs before the court.

In proceedings against the defendant under s.12 of the Magistrates' Courts Act 1980 a written application for prosecution costs under s.18 of the Prosecution of Offences Act 1985 was included in the form headed "Statement of facts" below a dotted line separating it from the recital of the facts. The defendant pleaded guilty by post and made a written statement in mitigation. When the case came before the magistrates' court the court clerk read out the statement of facts but indicated that he did not wish to read out the application for costs. The justices accepted his advice that the claim for costs should not be read out on the grounds (a) that they did not consider the application for costs to be properly a part of the statement of facts, (b) that it was not appropriate to deal with the costs before deciding whether to accept the plea of guilty and (c) that if the prosecutor wished to apply for costs he should attend in person.

Held: 1. A claim for costs by the prosecution against a defendant in proceedings under s.12 of the Magistrates' Courts Act 1980 could be notified to the defendant in the same document as that which contained the statement of facts under s.12(1)(b) thereof but did not form part of the statement of facts relating to the offence.

2. If such a claim was so notified it must be brought to the court's attention by the clerk to the justices and it was the duty of the court to adjudicate upon it under s.18 of the Prosecution of Offences Act 1985.

Per Watkins, L.J.:

"What is absolutely necessary forthwith is that the practice by clerks, wherever it is carried on, of not reading out to the justices a claim by the prosecutor for costs when neither the prosecutor nor the defendant are appearing must

cease. It is grossly improper not to bring that matter to the attention of the justices when the s.12 procedure has been followed."

Application: for judicial review by way of a declaratory judgment of a decision of Coventry justices in relation to an application for prosecution costs in proceedings under s.12 of the Magistrates' Courts Act 1980.

R. v. Coventry Magistrates' Court, ex parte Director of Public Prosecutions Q.B.D.

765

Procedure - request for social inquiry report - custodial sentence imposed notwithstanding favourable report - need to warn defendant that court may not follow recommendation made - limited jurisdiction of Divisional Court to interfere with sentence.

The applicant pleaded guilty at the magistrates' court to two offences of theft from his employers and a third offence was taken into consideration. As he was previously of good character the magistrate ordered a social inquiry report and a community service assessment report in accordance with ss.20 and 20A of the Powers of Criminal Courts Act 1973, but made no further observation and held out no kind of promise of the action she would take on receipt of the reports whether favourable or not. At the adjourned hearing, despite the fact that the reports recommended a community service order as an alternative to custody, the magistrate sentenced the applicant to a total of 90 days' imprisonment. The only record of the reason for imposing a custodial sentence was a statement in Form 5012 that "no other sentence appropriate". On appeal against sentence the Crown Court found, following an investigation, that no promise had been made by the magistrate to follow the recommendations of the reports if they were favourable to the applicant, and, being of opinion that he had been guilty of a serious breach of trust, dismissed the appeal.

On application for judicial review and a declaration that the Crown Court decision was wrong in law and/or such that no reasonable court could reach:

Held: 1. The only circumstances in which the Divisional Court could interfere with a sentence imposed either by justices or the Crown Court was when the sentencing court had acted in excess of jurisdiction or otherwise wrongly in law (*R. v. Acton Crown Court, ex parte Bewley* (1988) 152 J.P. 327. A failure by a magistrate to warn of possible consequences following receipt of a social inquiry report and other reports was not unlawful, no matter how great the defendant's feeling of injustice; nor could a failure to give reasons for a sentence invalidate a sentence which a court had power to pass.

2. When asking for a social inquiry report or other report a court should make it quite clear to the defendant either (i) that a favourable report will not necessarily have the effect of avoiding a custodial sentence or (ii) that such a report will have such an effect if that was what the court requesting the report had in mind.

Application: by Gary Richard McCann for judicial review of a decision of the Inner London Crown Court dismissing his appeal against a custodial sentence imposed at Woolwich magistrates' court.

R. v. Inner London Crown Court, ex parte McCann Q.B.D.

917

Procedure - summary trial - wrongful dismissal of charge after guilty plea - attempt to correct error by invoking s.142(1) of the Magistrates' Courts Act 1980 under which purported plea of not guilty entered - prosecution object to procedure and withdraw - case dismissed.

The defendant was charged with criminal damage and, having declined an offer of legal advice, pleaded guilty. An application by the prosecutor for a short adjournment pending the arrival of some papers was refused and because the prosecutor was unable to proceed, the chairman of the bench purported to dismiss the information. When the decision was brought to the notice of the clerk to the justices the defendant had left the court and it was decided, after consultation with an unknown representative of the Crown Prosecution Service, to invoke the procedure under s.142(1) of the Magistrates' Courts Act 1980 which empowers a court to vary or rescind a sentence or other order. When the case was re-listed at a later date the defendant, who in the meantime obtained legal advice, indicated that he intended to change his plea to not guilty and the justices allowed the change of plea, purporting to do so under s.142(1). The representative of the Crown Prosecution Service considered that that section was inappropriate and felt that he should take no further part in the proceedings. In that situation the justices, having allowed the change of plea, decided they had no alternative but to dismiss the information for the second time. On application for judicial review:

Held: Following a plea of guilty justices have no jurisdiction to dismiss the information and there was no statutory power which enabled a magistrates' court to re-open a dismissal. A dismissal was not a "sentence or other order" within the terms of s.142(1) of the Magistrates' Courts Act 1980; the words "other order" meant an order such as a conditional discharge, a probation order or an order of that sort which was akin to a sentence but not necessarily a sentence.

In the present case counsel for the respondent had submitted that as the original proceedings had only been purported to be brought to an end and that they had never come to an end, it was open to the magistrates' court to take the view that there had been no dismissal, to allow the change of plea and (because the prosecutor was not prepared to proceed) to dismiss the proceedings. However, that was not how the justices purported to deal with the matter. They purported to decide the issue on the basis of the arguments advanced under s.142(1) and it would be wholly wrong for a result to be upheld on the basis of the failure of the prosecutor to further prosecute after the change of plea, bearing in mind that he was arguing that s.142(1) did not apply. He had not turned his mind to the question of the proceedings being a nullity and he could not be criticized for not considering that alternative way of looking at the matter.

The decision to dismiss the information was made without jurisdiction and it would be an appropriate decision to quash, but in the particular circumstances of the case, having regard to the relatively minor offence, the fact that there had been three court hearings and the present position of the defendant, no order would be made.

Per Woolf, L.J.:

"Albeit that [it] is technically right that if an order to dismiss the proceedings is made wholly without jurisdiction so that it can be said to be a complete nullity, as happened here, there is a power for the court to disregard that decision, in my view, they should be very slow to do so. They should, in my view, only do so where both the prosecution and the defence and the court accept that is the inevitable result of what has happened, otherwise there is a very real danger - as illustrated by the facts in this case - that in their efforts to improve the situation the justices will in fact make the matter worse ... However, in the exceptional case, which is clear and where the parties are all in agreement, it does seem to me that it would be appropriate for the magistrates in their discretion to proceed to sentence albeit that they have previously made a mistake of the sort which occurred here.

It seems to me that to require the parties, where everyone is agreed that what happened was a nullity, to go to the expense of coming to this court would be wrong and that it is preferable for the matter to be dealt with expeditiously and more cheaply by the magistrates, then exercising the jurisdiction which they have failed up to then to exercise and sentence the defendant as appropriate."

Application: by the prosecution for judicial review of a decision of the Leighton Buzzard justices dismissing an information against Paul Anthony Thornton.

R. v. Leighton Buzzard Justices, ex parte Director of Public Prosecutions Q.B.D.

41

Procedure - (1) whether all co-accused must be heard when application is made to lift reporting restrictions and (2) whether breach of natural justice to prefer additional charge against accused so creating new custody time limit and defeating justices' obligation to release him on bail in respect of the earlier charge.

On November 9, 1989, the applicant was charged with murder and remanded in custody and on November 17 she was further charged with conspiracy to blackmail the murder victim. On December 22 the solicitor for one of the co-accused, in the absence of the applicant and another co-accused, applied for the lifting of reporting restrictions. The justices were advised by their clerk of the need to afford all the co-accused an opportunity to make representations on that application but despite that advice they made an order under s.8 of the Magistrates' Courts Act 1980.

On January 19, 1990, the custody time limit in respect of the murder charge expired but the time limit for the blackmail charge continued for another eight days. On January 24, however, the prosecutor, not realizing that the custody time limit for the latter charge had not expired and at that time awaiting advice from counsel in relation to other charges, arranged for the applicant and a co-accused to be brought before the justices and charged with theft and they were remanded in custody. Following advice received from counsel the applicant and other co-accused were also charged on February 1 with burglary and robbery and further remanded in custody on those charges. On March 29 the custody time limit on the theft charge only was extended.

On application for judicial review to challenge the decisions removing reporting restrictions and remanding her in custody on the theft charge:

Held: 1. When application was made for the lifting of reporting restrictions under s.8 of the Magistrates' Courts Act 1980 in committal proceedings involving a number of accused, all the accused had to be present and allowed to make representations before the justices reached a decision.

2. There was no authority for the proposition that justices were entitled to reject a new charge against an accused merely because it was a device to defeat their obligation to release him on bail under the Prosecution of Offences (Custody Time Limits) Regulations 1987. The Regulations referred to the "offence" in the singular and each offence attracted its own custody time limit. In the absence of *mala fides* the doctrine of abuse of the process of the court could not apply to decisions made on ancillary matters such as bail on the new charge made against the accused. In the present case the theft charge was properly brought at the time it was brought and the decision of the justices to remand the applicant in custody on that charge could not be criticized.

Application: for judicial review by Joyce Margaret Meikle in respect of decisions of the Wirral justices.

R. v. Wirral District Magistrates' Court, ex parte Meikle Q.B.D.

1035

Procedure - whether commendation of witness by Judge in presence of jury is prejudicial to a fair trial.

The appellant pleaded guilty to burglary and was charged on a second count with assault with intent to resist arrest. The case for the prosecution was that the appellant left the house he had broken into when the burglar alarm was activated and was chased by one of the witnesses. When they were within about six feet of each other the appellant lunged at the witness with an open knife but the witness was able to take evasive action and avoid injury. The appellant admitted he had a knife in his hand during the chase but alleged that the witness never got so close to him and denied there was any lunge at all. Another witness later joined the chase and assisted in securing the appellant's arrest.

In the presence of the jury the Judge called the two witnesses forward and commended them "for acting in such a brave and public way", emphasizing that he was doing so "without prejudicing the result of the case at all".

Held (dismissing the appeal): The question to be decided was whether the jury could have thought that the Judge was putting forward the two witnesses as credible witnesses whose evidence was to be preferred to that of the appellant by reason of what the Judge said to the two men in their presence. On the facts of the case the answer was no.

In future, where a Judge wished to commend witnesses for their action in connexion with the offence which was being tried, he should do so in the absence of the jury.

Appeal: by Geoffrey Newman against his conviction at Kingston Crown Court.

R. v. Newman C.A. (Crim. Div.)

113

PUBLIC HEALTH

Public health - statutory nuisances - whether a council tenant must give the council prior notice of the matters alleged to constitute a statutory nuisance before proceeding against the council by way of complaint to a justice of the peace - ss.91 et seq., Public Health Act 1936.

Although it is repugnant to commonsense so to hold, (a) a council tenant who begins statutory nuisance proceedings by way of complaint to a justice of the peace under s.99 of the Public Health Act 1936 is under no legal obligation to provide the council with prior notice of the details of his complaint; and (b) provided the tenant establishes that the statutory nuisance existed when the proceedings were commenced, he is entitled to an order for his costs, even though the nuisance has been remedied by the date of the hearing.

Per Watkins, L.J.: The state of the law contained in the judgment is probably the result of an oversight by Parliament, and consideration should be given to remedying it.

Appeal by way of case stated against a decision of the Warley magistrates.

Sandwell Metropolitan Borough Council v. Bujok Q.B.D.

608

RATING AND VALUATION

Rating - liability to pay rates in respect of unoccupied premises - s.17 and sch.1, General Rate Act 1967; s.22, Health and Safety at Work Act 1974.

The appellant owned certain premises, which at the material time were unoccupied, and in respect of which the respondent sought to levy rates in accordance with the provisions of s.17 of, and sch.1 to, the General Rate Act 1967.

The appellant disputed its liability to pay rates on the grounds that at the material time occupation of the premises was prohibited as a matter of law because (a) there was no relevant extant planning permission, and (b) following the discovery of loose brown asbestos in the premises, a prohibition notice had been issued, under s.22 of the Health and Safety at Work Act 1974.

A metropolitan stipendiary magistrate issued a distress warrant. On appeal by way of case stated to the Queen's Bench Division of the High Court.

Held (allowing the appeal in part): (1) On the facts there was a relevant extant planning permission; but (2) the practical effect of the service of the prohibition notice under the 1974 Act was to prohibit rateable occupation of the premises.

Appeal by way of case stated.

Regent Lion Properties Limited v. Westminster City Council Q.B.D.

49

Rating - proper approach for magistrates where a ratepayer claims to have been in occupation of only part of the premises in respect of which rates are claimed to be due.

Where there are proceedings in a magistrates' court for the recovery of rates in respect of certain premises which are represented by a single entry in the valuation list, and the ratepayer claims to have been in occupation of only part of the premises, the magistrates should approach the matter in two stages. The first question should be whether one part of the premises is capable of being occupied separately from the remainder. If this question is answered in the affirmative, the second question arises, namely has the ratepayer proved that he did not occupy part of the premises for the relevant period.

Appeal by way of case stated against a decision of Rotherham magistrates' court.

May v. Rotherham Metropolitan Borough Council Q.B.D.

683

Rating - whether bankruptcy court has power to stay committal proceedings for non-payment of rates - ss.102 and 103, General Rate Act 1967, and s.285, Insolvency Act 1986.

(1) Section 285(1) of the Insolvency Act 1986, which confers jurisdiction upon a bankruptcy court to stay "any action ... or other legal proceedings against the ... person of ... the bankrupt", is intended to protect the bankrupt's estate for the benefit of all his creditors; and therefore (2) the phrase "other legal proceedings" includes proceedings for a committal warrant for non-payment of rates; and (3) the Court of Appeal's decision in *In re Edgcombe, ex parte Edgcombe* [1902] 2 K.B. 403, to the effect that the power to stay does not apply to committal proceedings because they are at least partly punitive, was wrongly decided.

Appeal against a decision of the High Court.

Smith v. Braintree District Council H.L.

304

Rating - whether trespassers may be liable to pay rates - whether joint occupiers are severally liable to pay rates - General Rate Act 1967.

The appellant, along with a number of other persons, was in actual occupation of certain premises. All the occupiers were trespassers. The rating authority sought to recover rates in respect of the premises from the appellant. A stipendiary magistrate dismissed an application for a distress warrant on the ground that there was insufficient evidence of rateable occupation by the appellant to require him to respond to the rating authority's complaint. The rating authority appealed successfully to the High Court (see (1989) 153 L.G. Rev. 267; (1989) 153 J.P. 247). On appeal to the Court of Appeal,

Held (dismissing the appeal): There is no reason in law why a trespasser should not be held to be in rateable occupation of land, and where a number of trespassers are jointly in rateable occupation of land, they are each severally liable for the whole of the rates due in respect of the land.

Appeal against a decision of Henry, J. (see (1989) 153 J.P. 247; (1989) 153 L.G. Rev. 267).

Westminster City Council v. Tomlin C.A.

165

ROAD TRAFFIC

Road traffic - evidence - entry on driving licence - opportunity necessary for parties to be able to make submissions as to implications.

The appellant appealed to the Crown Court regarding an offence of speeding committed on July 13, 1987. The car was identified. It was one which at one time was in the ownership of the appellant. His defence was that he was not the

driver because he had previously sold the car in May 1987, inadvertently leaving his driving licence in the car. He had applied for a duplicate licence in December 1987, which had been issued in May 1988.

The Crown Court inspected the duplicate and it showed an entry that the appellant had been sentenced on October 14, 1987, at Bow Street magistrates' court for a speeding offence. The Crown Court, of its own motion and without hearing any evidence, was of the opinion that the appellant would have had to have produced a licence before the Bow Street court before that court could have imposed any penalty. He must, therefore, have been in possession of a driving licence on or before October 14, 1987, that is during the interval. The Crown Court consequently concluded that the appellant's account was untruthful.

Held: It was not acceptable for a court to take a point of this kind of its own motion without giving everyone an opportunity to deal with it.

Appeal by Michael Robinson by way of case stated allowed and case remitted to the Crown Court.

Robinson v. Chief Constable of Derby Q.B.D.

953

Road traffic - excess alcohol - calculation of amount of excess alcohol in the body - back-calculation from a figure taken at a later time to the time of driving - ss.6(1) and 10(2) of the Road Traffic Act 1972.

At about 10.45 p.m. on May 7, 1985, the appellant left a public house in Birmingham with his brother. He drove across the city erratically for about six miles. At about 11.15 p.m. he collided at high speed with the wall of an underpass in the city centre, thereby killing his brother.

The appellant was subsequently taken to hospital and there at 3.35 a.m. with the consent of the doctor in charge he provided a specimen of blood for analysis. The analysis revealed a concentration of not less than 59 mg of alcohol per 100 ml of blood, below the prescribed limit.

The prosecution called medical evidence and established that the concentration of alcohol in the appellant's body 4 hours and 20 minutes before the specimen was collected and at the time of the collision would have been in excess of the prescribed limit. The appellant was convicted and appealed against the conviction on the ground that the prosecution was not entitled to rely on the evidence of the back calculation.

Held: The prosecutor was entitled under s.6(1) and s.10(2) of the Road Traffic Act 1972, as amended, to adduce evidence other than by way of the specimen provided by the accused in order to prove the proportion of alcohol in the accused's body at the material time.

Per curiam: The prosecution should not seek to rely on evidence of back-calculations save where the evidence was both easily understood and clearly established the presence of excess alcohol at the time when the accused was driving. Justices must be very careful, especially where there was conflicting evidence, not to convict unless upon scientific and other evidence, which they found it safe to rely upon, they were sure that there was an excess of alcohol in the defendant's body when he was actually driving as charged.

Appeal by Stephen Gary Gumbley against his conviction dismissed.

Gumbley v. Cunningham H.L.

686

Road traffic - excess alcohol - certiorari - failure to produce witness - breach of natural justice.

The applicant was convicted of offences of failing to provide specimens of breath contrary to s.8(7) of the Road Traffic Act 1972, (now s.7(6) of the Road Traffic Act 1988), and of driving a motor vehicle whilst unfit to drive through drink or drugs contrary to s.5(1) of the 1972 Act (now s.4(1) of the Road Traffic Act 1988).

Part of the applicant's defence had been that he had not been offered an opportunity to breathe into the breath test device at all.

The summary of the case supplied by the Crown Prosecution Service stated that the evidential breath test machine had not been in operation with the result that the applicant had been offered the opportunity to give either a sample of blood or urine.

The Crown Prosecution Service refused to identify who had prepared the statement or to produce the person at the hearing. The magistrates nevertheless eventually determined to hear the case on October 6, 1989, and the convictions followed.

It was contended by the applicant that there had been a breach of natural justice in that the magistrates should not have proceeded without the author of the summary having been produced.

Held: The justices had not accepted the applicant's version of events and their decision to convict had been fair; it was not accepted that the maker of the summary, who had made an error when preparing it, should have been produced to the justices.

Application by Edward George Dent by way of judicial review in respect of a decision of the Redbridge magistrates' court dismissed.

R. v. Redbridge Justices, ex parte Dent Q.B.D.

895

Road traffic - excess alcohol - evidence by the defence as to the amount of alcohol in the body - evidence of proportion consumed after ceasing to drive, for the purpose of s.10(2) of the Road Traffic Act 1972 (now s.15(2) of the Road Traffic Offenders Act 1988) - whether evidence may also be called by the defence as to the proportion consumed before ceasing to drive - s.6(1) Road Traffic Act 1972, as amended (now s.5(1) Road Traffic Act 1988).

The appellant was on January 24, 1989, convicted by the justices for the City of London that on December 1, 1988, he drove a motor vehicle on a road called the Minorities, EC3, after consuming alcohol in such a quantity that the proportion in his breath exceeded the prescribed limit contrary to s.6(1) of the Road Traffic Act 1972, as amended (now s.5(1) of the Road Traffic Act 1988).

The appellant had eaten sandwiches and drunk a bottle of wine at lunch between 1.15 p.m. and 3.45 p.m. On leaving his office at 5.30 p.m., he had driven his car from a car park to the Minorities and parked it in Aldgate Bus Station near a public house where soon after 5.45 p.m., he had drunk nearly all of a large whisky. He then left and returned to his car which, at about 6.10 p.m., he drove to another parking place. He returned to the public house and drunk most of a pint of beer when police officers spoke to him and invited him outside. He went and after the usual procedure he provided at the police station two specimens of breath on an intoximeter device at about 7.15 p.m. The readings were identical, namely, 56 mg of alcohol to 100 ml of breath. About an hour later, he provided a specimen of blood which when analyzed was found to contain 97 mg of alcohol to 100 ml of blood.

It was submitted on behalf of the appellant that expert evidence could be called by him for the purpose of calculating retrospectively the effect of the whisky drunk prior to driving as well as the beer drunk after driving.

Held: Distinguishing *Cracknell v. Willis* [1987] 3 All E.R. 801 and *Gumbley v. Cunningham* [1989] 1 All E.R. 5 and applying *Beauchamp-Thompson v. Director of Public Prosecutions* [1989] R.T.R. 54, the assumption in s.10(2) was irrebuttable subject to the exception.

The appellant was not entitled to give evidence of his consumption of alcohol prior to driving and evidence of a medical and scientific nature to explain the effect of that alcohol in his breath, blood or urine at the time of driving for the purpose of seeking to establish that at the time of driving the level of alcohol in his breath, blood or urine was below the prescribed limit, notwithstanding that at the time the specimen was provided, the proportion of alcohol in the specimen exceeded the prescribed limit.

Appeal by William Windover Millard by way of case stated against his conviction by the City of London justices dismissed.

Millard v. Director of Public Prosecutions Q.B.D.

626

Road traffic - excess alcohol - failure of Intoximeter device to provide two valid specimens of breath - possible to rely on two further specimens produced on another device.

The appellant was charged with having driven a motor vehicle on a road after consuming so much alcohol that the proportion in his breath exceeded the prescribed limit contrary to s.6(1) of the Road Traffic Act 1972, as amended (now s.5(1) of the Road Traffic Act 1988). The case was heard by the Rotherham justices who found that the appellant who had been the driver of a vehicle involved in an accident had been required to provide and had provided at Maltby Police Station two specimens of breath for analysis by a Lion Intoximeter device. Before the first sample was provided, the device was seen to perform the usual self-testing procedure, but after the second sample had been provided, the self-testing procedure indicated that the device was no longer functioning normally.

Following this indication by the device, the appellant was with his consent taken to a second police station, in Rotherham, where he provided two further specimens of breath. The lower of the two readings was in excess of the limit.

Held: Applying *Sparrow v. Bradley* [1985] R.T.R. 122, if a police officer considered that the first device was not working properly, then for him to give the person an opportunity to blow into another device could not possibly be said to be any departure from the procedure. In the interests of both the motorist and the police, if a device failed to provide two valid specimens of breath, another attempt could be made on a device which was working properly.

Appeal by the appellant, Warren Thomas Denny, by way of case stated against his conviction by the Rotherham justices dismissed.

Denny v. Director of Public Prosecutions Q.B.D.

460

Road traffic - excess alcohol - failure to refer to option of urine - dismissal - costs out of central funds in favour of defence - whether dismissal on a technicality.

The appellant, Alan Wareing, had an information laid against him at Greenwich magistrates' court for driving a motor vehicle on a road or other public place having consumed so much alcohol that the proportion in his blood exceeded the prescribed limit contrary to s.6(1)(a) and sch.4 to the Road Traffic Act 1972 (now s.5 of the Road Traffic Act 1988).

The stipendiary magistrate found *prima facie* evidence of certain facts usually present in such cases and further that Mr. Wareing had provided one specimen of breath at the police station which was over the prescribed limit. The machine had then failed and a second test was not completed. The police sergeant had then required the appellant to provide a sample of blood. He agreed to do so. A doctor was called and the sample had been taken. It was found to contain not less than 90 mg of alcohol in 100 ml of blood.

The information was dismissed because it was accepted at the conclusion of the prosecution case that the officer, in following the procedures, had made no reference to the possibility of the appellant providing a specimen of urine.

An application for costs out of central funds in favour of the appellant was refused. The magistrate considered the (1982) *Practice Note* which provides that although a successful defendant should normally get his costs, where there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit, the court may properly exercise its discretion to refuse to award costs from central funds. The magistrate took the view that the appellant had been acquitted on a technicality and for that reason refused his application for costs.

Held: The failure of the police to follow the appropriate procedure under the Road Traffic Act in a material and significant respect and so to prevent the appellant from giving an appropriate consent could not be considered a technicality.

Appeal by way of case stated granted and direction made for payment of costs out of central funds.

Wareing v. Director of Public Prosecutions Q.B.D.

443

Road traffic - excess alcohol - intoximeter 3000 machine - print-out accepted as real evidence - failure by constable to sign print-out therefore immaterial.

The appellant was arrested for driving with excess alcohol and taken to Greenwich police station to an approved Lion Intoximeter 3000 machine. An initial calibration check showed that the machine was working correctly. The appellant provided two specimens of breath and the lower of the two readings indicated 54 mg of alcohol in 100 ml of breath, being over the limit.

The officer gave a copy of the print-out produced by the machine to the appellant. The appellant signed another copy of the print-out which was produced at the hearing as an exhibit. The officer failed to sign the certificate on the copies of the print-out under s.10(3) of the Road Traffic Act 1972 (now s.16(1) of the Road Traffic Offenders Act 1988) that the print-out related to a specimen provided by the appellant at the date and time shown.

Held: Applying *Castle v. Cross* [1985] 1 All E.R. 87, the print-out was an admissible document at common law as representing real evidence, quite apart from s.10(3), providing, as happened, the officer was called to prove the document.

The failure to sign the certificate on any of the copies was an essential missing link which was completed by the oral evidence of the officer and therefore the lacuna was filled.

Appeal by the appellant, William Garner, by way of case stated against his conviction by the justices for the Inner London Area acting in and for the South Eastern Division dismissed.

Garner v. Director of Public Prosecutions Q.B.D.

277

Road traffic - excess alcohol - medical reasons for not supplying specimens - distinction between s.8(3)(a) and s.8(7) of the Road Traffic Act 1972 (now s.7(3) and 7(6) of the Road Traffic Act 1988).

The appellant was convicted by justices for the Petty Sessional Division of Odiham, sitting at Aldershot, for having at Aldershot Police Station on June 26, 1988, having been required by a constable in the course of an investigation into an offence under s.5 or 6 of the Road Traffic Act 1972, to provide a specimen of urine for a laboratory test, failed without reasonable excuse to provide such a specimen.

In the course of the investigation, the appellant was required to supply two specimens of breath but refused for the medical reason that he was taking a drug - Priadel - which a psychiatrist had told him would influence the alcoholic content of his blood stream.

The police sergeant accepted this explanation and required the appellant to supply a sample of blood. The appellant refused for the medical reason that he suffered from haemophilic tendencies as could be evidenced by a small cut received earlier which was still bleeding.

Again this explanation was accepted by the sergeant who then required the appellant to provide two specimens of urine within one hour. The appellant was asked whether there was any medical reason why he could not supply urine. He replied that while there was no medical reason, he was currently taking large doses of various vitamins which would influence the analysis and as such would not provide the urine samples. He was charged and subsequently convicted of failing to supply specimens of urine contrary to s.8(7) of the Road Traffic Act 1972.

Held: (1) The sergeant was entitled to require a specimen of urine if, but only if, in the words of s.8(3), he had "reasonable cause to believe that for medical reasons a specimen of breath (could) not be provided or should not be required".

(2) Applying *Davies v. Director of Public Prosecutions* [1988] R.T.R. 156 at p.162C per Mann, J., the question whether the police officer had reasonable cause to believe that a specimen of breath could not be provided or should not be required was a question of fact to be objectively determined by the justices.

(3) As the test was an objective one, it was immaterial that the officer concerned was sceptical about the reason given to him or might even be left in a state of disbelief.

(4) The officer was to be treated as a layman in medical matters.

(5) There was a clear distinction between the medical evidence relevant to the question of reasonable excuse under s.8(7) and the evidence relevant to s.8(3)(a). A reasonable excuse under s.8(7) only arose if there were some evidence of incapacity or of some risk to health and the concern was with the knowledge and belief of the driver as well as with his actual state of health. Under s.8(3)(a) the concern was with the state of knowledge of the constable and with the reasonable state of belief of someone with that knowledge.

(6) The purpose of s.8 was to provide a mechanism whereby evidence could be obtained to support a prosecution while at the same time ensuring that sufficient safeguards were introduced to protect the position of the potential defendant.

(7) Even if the words "cannot be provided" in s.8(3)(a) related exclusively to physical or mental capacity to provide a specimen, no similar restriction could be placed on the words "should not be required".

(8) Although the sergeant in the present case directed his attention to the "could not provide" test, the court was not concerned with the actual belief of the officer but with whether a constable with that state of knowledge had reasonable cause to hold the belief that the breath specimens should not be required when he asked whether there was any medical reason why the appellant should not provide urine.

(9) Regardless of whether, in the cold light of day, the medical reason advanced for declining to provide a specimen of breath was satisfactory and whether the appellant might have been charged with failing without reasonable cause to provide the specimens of breath, the officer had reasonable cause to believe that for medical reasons a specimen of breath should not be required.

(10) The officer was, therefore, entitled to proceed to require a specimen of blood and then specimens of urine and the appellant was rightly convicted.

Per curiam: There was great force in the argument that a medical reason was incapable of leading to a belief that a specimen of breath could not be provided under s.8(3).

Appeal by the appellant, Gordon Edward Davies, by way of case stated against his conviction by the Odiham justices dismissed.

Davies v. Director of Public Prosecutions Q.B.D.

336

Road traffic - excess alcohol in breath - whether possible to convict when only one specimen of breath provided - whether possible for accused to adduce evidence to show that the Lion Intoximeter machine was defective and as to the amount of alcohol he had consumed.

The appellant on April 7, 1986, was convicted by the Bromley magistrates of the offence of driving a motor vehicle on a road with excess alcohol in his breath contrary to s.6(1) of the Road Traffic Act 1972, as substituted by the Transport Act 1981, and was also convicted of the offence of failing to provide a specimen of breath contrary to s.8(7) of the Road Traffic Act 1972, as substituted by the 1981 Act.

The appellant contended:

(1) That he should not have been convicted of both offences of failing to supply a specimen of breath and of actually supplying a specimen of breath which exceeded the prescribed limit, when he had supplied one specimen only, and,

(2) that he should have been allowed to adduce evidence of the amount of alcohol which he had consumed in order to show that the Lion Intoximeter machine was defective.

Held: (1) Overruling *Duddy v. Gallagher* [1985] R.T.R. 401 and *Burridge v. East* (1986) 150 J.P. 347; [1986] R.T.R. 328, the specimen to be used was the lower of two and the magistrates were not entitled to rely under s.8 and s.10(2) of the Road Traffic Act 1972, on one specimen only for a conviction, and,

(2) overruling *Hughes v. McConnell* [1986] 1 All E.R. 269 and *Price v. Nicholls* [1985] R.T.R. 155, the evidence of the breath specimen reading was not conclusive evidence of the quantity of alcohol in the appellant's breath at the time of driving. The wording of s.10(2) of the Road Traffic Act 1972, was not such as to limit the challenge to the reliability of a device to any particular type of evidence. The appellant was entitled to challenge the breath specimen reading and to adduce evidence of the amount of alcohol he had consumed. Evidence was admissible which, if believed, provided material from which the inference could reasonably be drawn that the machine was unreliable.

Per curiam: When assessing the penalty for failing to provide a specimen of breath without reasonable excuse, the court was entitled to take into account any evidence that indicated the motorist's consumption of alcohol, including the result of the first breath specimen if he unreasonably refused to provide a second specimen.

Appeal allowed in part and appellant's conviction under s.6(1)(a) of the Road Traffic Act 1972, as substituted, of driving with excess alcohol quashed but conviction under s.8(7) of the 1972 Act of failing to provide a specimen of breath without reasonable excuse confirmed.

Cracknell v. Willis H.L.

728

Road traffic - excess alcohol - lower of breath specimen readings 45 mg - option of blood or urine offered and agreed in accordance with s.8(2) of the Road Traffic Act 1988 - urine sample in fact supplied under s.7(3)(b) - whether urine sample supplied under different section fulfilled the option requirements of s.8(2) - s.5(1) Road Traffic Act 1988.

The appellant was convicted of driving a motor vehicle on a road after consuming so much alcohol that the proportion of it in his urine exceeded the prescribed limit, contrary to s.5(1) of the Road Traffic Act 1988.

In accordance with the usual procedure, the appellant provided two specimens of breath on a Lion intoximeter machine. The lower of the two readings was 45 mg. The police sergeant then followed the procedure for the statutory option in s.8(2) of the Road Traffic Act 1988, and stated he would take a urine specimen to which the appellant agreed.

At that stage, the sergeant observed that the intoximeter machine had not provided a print-out. He then decided that the machine was, therefore, unreliable and proceeded under s.7(3)(b) of the 1988 Act and asked again for a specimen of blood or urine. After speaking to his solicitor, the appellant agreed to provide and provided two specimens of urine in response to the request under s.7.

After the proceedings were complete, the intoximeter machine produced a print-out which confirmed the readings. The "modem" switch at the rear of the machine had been in the wrong position. The officer had not moved through the check list to try to find the fault. The switch was usually kept in the "on" position.

It was contended by the appellant that the court was not entitled to take into account the evidence that the amount of alcohol in his urine exceeded the prescribed limit because that evidence was improperly obtained by the police. A reliable device had been available and the sergeant could not reasonably have believed in accordance with s.7(3)(b) that a reliable device was not available.

It was contended by the respondent that the sergeant could reasonably believe that a reliable device was not available even though it was.

Held: The statutory option had been offered under s.8(2). Even though the urine samples had been provided under s.7, they fulfilled the option requirement under s.8(2) and the appellant was rightly convicted.

Per curiam: The police officer could not reasonably have believed that a reliable device was not available and thus require the appellant to provide a urine sample on pain of committing a criminal offence by refusing so to do. Not only was there nothing wrong with the device but this would have been disclosed by following the routine procedures which could and should have been operated by any constable.

Appeal by David Alan Jones by way of case stated dismissed.

Jones v. Director of Public Prosecutions Q.B.D.

1013

Road traffic - excess alcohol - specimens of breath - lower of appellant's readings 48 mg - option range between over 35 mg and 50 mg or less of alcohol in 100 ml of breath - appellant given option to provide blood - appellant at first refusing but then changing mind and agreeing - magistrates finding that statutory procedures complete with refusal - blood sample subsequently provided - whether respondent entitled to rely on specimen of breath - s.8(6) Road Traffic Act 1972 (now s.8(2) Road Traffic Act 1988).

The appellant drove a motor vehicle with excess alcohol in his body on February 13, 1988, at Brettingham Avenue, Cringleford. He was arrested and provided two specimens of breath. The specimen with the lower proportion of alcohol contained 48 mg of alcohol in 100 ml of breath.

As the reading was in the option range, the appellant was at 01.32 hours offered the opportunity to provide a blood specimen. He refused the offer. Later, after consulting a solicitor, he changed his mind at 02.34 hours and agreed to provide a blood sample and was allowed to do so.

It was contended by the appellant that a blood sample having been provided, the respondent was not entitled to rely on the specimen of breath but was obliged instead under s.8(6) to rely on the blood sample.

Held: That it was a matter for the court to decide and that the court was entitled to find that at the time the appellant had been given the opportunity to provide a blood specimen and had firmly rejected the option, the statutory procedures had come to an end notwithstanding that a co-operative policeman had given the opportunity to provide the alternative blood sample. The respondent was entitled to rely on the specimen of breath.

Appeal by the appellant, Dennis Edward Smith, by way of case stated against his conviction by the Norfolk justices dismissed.

Smith v. Director of Public Prosecutions Q.B.D.

205

Road traffic - excess axle weight - compensating arrangement - whether offence contrary to reg.80(1) (excess weight) or reg.80(2) (excess over sum of weights under compensating arrangement) of the Road Vehicles (Construction and Use) Regulations 1986.

The respondents were acquitted by the South Ribble magistrates for using a Foden rigid tipper vehicle on a road contrary to reg.80(1)(b) of the 1986 Regulations and s.40 of the Road Traffic Act 1972 (now s.41 of the Road Traffic Act 1988).

Regulation 80(1) prohibits the use etc. of a vehicle with the prescribed weights exceeded, "subject to para.(2)".

Paragraph 2, to which para.1 is made subject, provides:

"Where any two or more axles are fitted with a compensating arrangement in accordance with reg.23 the sum of the weights shown for them in the plating certificate shall not be exceeded. In a case where a plating certificate has not been issued the sum of the weights referred to shall be that shown for the said axles in the plate fitted in accordance with reg.66."

The vehicle in question was one for which a plating certificate had been issued and on both the second and third axles the permitted weight was exceeded. However, those axles were fitted with a compensating arrangement in accordance with reg.23.

It was contended on behalf of the respondents that the paragraphs created separate offences and that any offence was contrary to para.2 and not para.1 as charged because the weight limit exceeded was not that specified in para.1 but para.2 to which para.1 was made subject.

Held: The words "subject to" were to be regarded as importing into the prohibitions of para.80(1) the qualifications in para.2. The two paragraphs did not create distinct offences and the offence would be committed under para.1.

Per curiam: It would be better if in future cases concerning vehicles with a compensating axle arrangement, there was a reference to both paragraphs.

Appeal by Director of Public Prosecutions by way of case stated against the decision of the South Ribble magistrates allowed.

Director of Public Prosecutions v. Marshall and Bell Q.B.D.

508

Road traffic - excess speed - motor tractor - recovery vehicle - whether constructed itself to carry a load - definition in s.137(2) of the Road Traffic Regulation Act 1984 - ss.86, 89, 136 and 137 of the 1984 Act.

The appellant was acquitted of driving on July 14, 1988, on the M40 motorway at Gerrards Cross a motor tractor, a

light locomotive or a heavy locomotive on that road at a speed greater than 40 miles per hour, being the speed specified in sch.6 to the Road Traffic Regulation Act 1984 as the maximum speed for a vehicle of that class, contrary to s.86 and 89 of that Act.

The vehicle was a recovery vehicle on its way to recover a broken down vehicle and was equipped with a special "arm" to assist in the recovery of broken down vehicles. Schedule 6 to the Road Traffic Regulation Act 1984, provides a different speed limit for motor tractors. A "motor tractor" is defined by s.136(6) of the 1984 Act as "a mechanically propelled vehicle which is not constructed itself to carry a load, other than excepted articles" - which were not relevant - "and of which the weight unladen does not exceed" a specified limit.

Section 137(2) of the 1984 Act provides:

"For the purposes of s.136 of this Act, in a case where a motor vehicle is so constructed that a trailer may by partial superimposition be attached to the vehicle in such a manner as to cause a substantial part of the weight of the trailer to be borne by the vehicle, that vehicle shall be deemed to be itself constructed to carry a load."

Held: (1) Distinguishing the *Director of Public Prosecutions v. Yates* [1989] R.T.R. 134 on the ground that there was no extending definition section comparable to s.137(2) applicable in that case, and applying the definition in s.137(2) of the Road Traffic Regulation Act 1984, a broken down vehicle borne by the recovery vehicle would be a trailer which by partial superimposition would be attached to the vehicle in such a manner as to cause a substantial part of its weight to be borne by the vehicle. Accordingly, the recovery vehicle was deemed to be a vehicle itself constructed to carry a load and could not be a motor tractor, a light locomotive or a heavy locomotive within the meaning of s.136(6) and (7).

(2) Applying *Cobb v. Whorton* [1977] R.T.R. 392, a vehicle could fall within the definition both of a "motor vehicle" and of a "trailer" under s.136(1) of the 1984 Act.

Appeal by the Director of Public Prosecutions by way of case stated against the acquittal of John Frederick Holtham dismissed.

Director of Public Prosecutions v. Holtham Q.B.D.

647

Road traffic - failure to offer statutory option of providing blood or urine sample - certiorari - conviction quashed - s.6 Road Traffic Act 1972 (now s.5 Road Traffic Act 1988).

The applicant was convicted on June 13, 1989, on his own admission of driving a motor vehicle having consumed alcohol such that the proportion in his breath exceeded the prescribed limit, contrary to s.6 of the Road Traffic Act 1972. The applicant was asked if he had been offered the statutory option of providing a blood or urine sample and said that he had not. The lack of the option was confirmed by the Crown Prosecution Service.

Held: The failure to offer the statutory option was fatal and there was no alternative but to quash the conviction.

Application: by John Nigel Charles for judicial review of a decision of the Flint justices granted and his conviction quashed.

R. v. Chwyd Justices, ex parte Charles Q.B.D.

486

Road traffic - fixed penalties - service of notice to owner - register kept by the Driver and Vehicle Licensing Centre - registration in name of unincorporated bodies.

In 1988, the police sought to register four unpaid fixed penalties with the clerk to the justices for enforcement. The clerk refused to accept them because the registration certificates referred neither to people nor to bodies corporate but to an unincorporated firm and were, therefore, not only difficult or impossible to enforce but invalid.

Held: Schedule 1 to the Interpretation Act 1978 defines "person" as "includes a body of persons corporate or unincorporate".

The word "person" in s.36(6) of the Transport Act 1982 (now s.70(1) of the Road Traffic Offenders Act 1988) included an unincorporated body of persons and the requirement in s.36(6) for the clerk to register the unpaid fixed penalty for enforcement as a fine against an unincorporated body was mandatory.

Application for judicial review by way of certiorari and mandamus.

R. v. The Clerk to the Croydon Justices, ex parte Chief Constable of Kent Q.B.D.

118

Road traffic - footpath by the side of a road - meaning of riding - s.72, Highways Act 1835.

The appellant was convicted by the Cirencester juvenile court on August 31, 1988, of riding a motor cycle on a footpath by the side of a road made or set apart for the accommodation of foot passengers contrary to s.72 of the Highways Act 1835.

The facts were that a motor cycle was ridden by the appellant along the alleyway between Cricklade Street and Akeman Court in Cirencester on April 11, 1988, at about 6.50 p.m. The alleyway was a footway, not part of a road but between the roads.

The appellant was astride the motor cycle with his feet on the pegs, or, alternatively, propelling it with his feet. The motor cycle engine was running.

In order to reach the alleyway from Cricklade Street, a person must travel on the footpath by the side of that road.

Held: (1) Applying *R. v. Pratt* (1867) 30 J.P. 246; [1867] 3 Q.B. 64, the s.72 enactment was not intended to apply to footpaths in general but only to those footpaths which ran along the side of a road; and

(2) there was no evidence that the motor cycle had been ridden over the pavement of Cricklade Street.

Per curiam: The appellant was riding the motor cycle even on the basis that he was simply sitting astride it and propelling it with his feet.

Appeal: by Justin Richard Selby by way of case stated against his conviction by the Cirencester juvenile court allowed.

Selby v. Director of Public Prosecutions Q.B.D.

566

Road traffic - in charge whilst unfit through drink or drugs - in charge with excess alcohol - meaning of in charge - ss.5 and 6, Road Traffic Act 1972 (now ss.4 and 5, Road Traffic Act 1988).

The appellant, Steven Watkins, was charged that he (1) on February 13, 1988, at Noel Street, London, W.1. was in charge of a motor vehicle on a road whilst unfit through drink or drugs contrary to s.5 of and sch.4 to the Road Traffic Act 1972, as amended; and (2) on the same date and at the same place was in charge of a motor vehicle on a road or other public place when the proportion of alcohol in his blood exceeded the prescribed limit contrary to s.6 of and sch.4 to the same Act, as amended.

The appellant was found, drunk, by two uniformed police officers when he was seated in the driver's seat of a Mini motor car. The appellant did not own the car and there was no evidence that he was in the car with the owner's permission. He held an ignition key for a different make of car but which could be inserted in the ignition of the Mini although there was no evidence that the key would start the car. The lights were not switched on and the engine was not running. He had a blood alcohol level above the prescribed limit.

Held: (1) There had to be a close connexion between the appellant and control of the vehicle before the appellant could be found to be in charge. It was for the court to consider all the relevant factors and reach its decision as a question of fact and degree.

(2) If the person was the owner of the car or the lawful possessor or had recently driven it, he would have been in charge of it and the question for the court would be whether he was still in charge or whether he had relinquished his charge. Usually such a person would be *prima facie* in charge unless he had put the vehicle in someone else's charge. However, he would not be so if in all the circumstances he had ceased to be in actual control and there was no realistic possibility of his resuming actual control whilst unfit: e.g. if he were at home in bed for the night, if he were a great distance from the car or if it had been taken by another.

(3) If the person was not the owner, the lawful possessor or recent driver but was sitting in the vehicle or was otherwise involved with it, the question for the court was, as in this case, whether he had assumed being in charge of it. In this class of case, the person would be in charge if, whilst unfit, he was voluntarily in *de facto* control of the vehicle or if, in the circumstances, including his position, his intentions and his actions, he might be expected imminently to assume control. Usually this would involve his having gained entry to the car and evinced an intention to take control of it. But gaining entry might not be necessary if he had manifested that intention some other way, e.g. by stealing the keys of a car in circumstances which showed he meant presently to drive it.

(4) The following facts would be relevant:

- (i) Whether and where he was in the vehicle or how far he was from it.
- (ii) What he was doing at the relevant time.
- (iii) Whether he was in possession of a key that fitted the ignition.
- (iv) Whether there was evidence of an intention to take or assert control of the car by driving or otherwise.
- (v) Whether any other person was in, at or near the vehicle and if so, the like particulars in respect of that person.

Appeal by way of case stated by the Crown Prosecution Service against a decision of the North Westminster magistrates sitting at Wells Street; appeal allowed and case remitted to the magistrates to continue the hearing.

Director of Public Prosecutions v. Watkins Q.B.D.

370

Road traffic - motorway regulations - overtaking in the offside lane of a three lane carriageway - prohibition inter alia on heavy motor car goods vehicles - meaning of regulation - reg.12(1) of the Motorways Traffic (England and Wales) Regulations 1982 having effect as if made under the Road Traffic Regulation Act 1984.

The appellant was convicted by the St. Albans justices for having on June 20, 1988, unlawfully driven a two axle rigid motor lorry on the offside of a three lane carriageway, the M25 motorway, contrary to reg.12(1) of the Motorways Traffic (England and Wales) Regulations 1982.

The prohibition in reg.12(1) applies to:

- (a) a goods vehicle which has an operating weight exceeding 7.5 tonnes;
- (b) (certain passenger vehicles);
- (c) a motor vehicle drawing a trailer; and
- (d) a motor vehicle other than a motor vehicle constructed solely for the carriage of passengers and their effects which does not fall within subparas.(a), (b) or (c) and which is a heavy motor car, a motor tractor, a light locomotive or a heavy locomotive.

The motor vehicle in question did not fall within (a), (b) or (c).

Held: "Heavy motor car" was not defined in the 1982 Regulations. It therefore had the same meaning as in the Road Traffic Regulation Act 1984. Under s.136(3) of that Act, "heavy motor car" means a mechanically propelled vehicle, not being a motor car, which is constructed itself to carry a load or passengers and of which the weight unladen exceeds 2540 kilogrammes". The unladen weight of the vehicle did exceed 2540 kilogrammes. It was therefore a heavy motor car and caught by the regulation.

Appeal by Neil Terence McCrory by way of case stated against his conviction by the St. Albans justices dismissed.

McCrory v. Director of Public Prosecutions Q.B.D.

520

Road traffic - operators' licence - tachograph requirements - definition of agricultural machine.

The respondent company was acquitted by Avon justices sitting for the Avon North Division on September 2, 1988, in respect of two informations. The first alleged that on August 19, 1987, at Aust, the respondent company had used a goods vehicle for the carriage of goods for hire or reward except under a licence granted under Part V of the Transport Act 1968, contrary to s.60(1)(a) of that Act; and that it had used a goods vehicle without a tachograph fitted, contrary to s.97(1)(a) of the Transport Act 1968, as amended by the Passenger and Goods Vehicles (Recording Equipment) (Amendment) Regulations 1984 and the Community Drivers Hours and Recording Equipment Regulations 1986.

The facts found were that a Unimog vehicle was stopped on the M4 motorway by a police officer whilst it was towing a composite trailer consisting of a semi-trailer and a convertor dolly. The semi-trailer was loaded with a tractor and an attached trailer.

On this occasion, the vehicle was being driven to a farm site within a 50 km radius from the company's base, and was being used for the carriage of goods for a contract with a farmer to provide drainage on the farm. The vehicle was a transporter to transport machines from site to site and also used for back-filling holes.

The respondent company had carried out some non-agricultural work and the company had not been aware that the company's use of the vehicle had to be confined to agriculture.

The vehicle was classified for excise purposes as an agricultural tractor subject to it being used in an approved manner. There was no operator's licence in force for the Unimog and there was no tachograph or ministry plate fitted to the vehicle.

Certain exemptions from the requirement to hold an operator's licence are contained in the Goods Vehicles (Operators' Licences, Qualifications and Fees) Regulations 1984, reg.34 and sch.5). This schedule incorporated the relevant part of sch.3 of the Vehicles (Excise) Act 1971. Paragraph 2(1) of that schedule provided:

"In this schedule 'agricultural machine' means a locomotive ploughing engine, tractor, agricultural tractor or other agricultural engine which is not used on public roads for hauling any objects, except as follows, that is to say ... (d)

for hauling articles required for a farm by the person in whose name the vehicle is registered as aforesaid, being either the owner or occupier of the farm or a contractor engaged to do agricultural work on the farm by the owner or occupier of the farm, or for hauling articles required by that person for land occupied by him with a farm ..."

There was a definition in another Act in a different context but there was no definition in the relevant provisions of an "agricultural tractor". The justices found that the vehicle was an agricultural tractor.

It was contended by the appellant that in view of the wording of para.2(1) of sch.3 of the 1971 Act, the finding that on some occasions the vehicle was not used for agricultural purposes was fatal to the exception.

It was also contended by the appellant that under the Finance Act 1971, s.6, there was a further restriction on the definition. Section 6 referred to the purpose of sch.3 to the 1971 Act (annual rates of duty on tractors, etc.) and stated that a mechanically propelled vehicle should not be within the term "tractor" where used in the definition of "agricultural machine" in para.2 unless certain qualifications were fulfilled which were not in fact fulfilled by the Unimog.

It was further contended that under s.95(2) of the Transport Act 1968, the part of the Act relevant for the tachograph provisions applied to goods vehicles, that is to say ... "any motor vehicle so constructed that a trailer may by partial superimposition be attached to the vehicle in such a manner as to cause a substantial part of the weight of the trailer to be borne by the vehicle; and (ii) motor vehicles ... constructed or adapted to carry goods other than the effects of passengers."

Held: (1) Whether the vehicle was an agricultural tractor was a question of fact for the justices and the finding that it was an agricultural tractor was not inconsistent.

(2) Under para.1 of sch.5 of the 1984 Regulations, one had to look at the occasion in question. It was not material that on some other occasion the respondent company might have committed an offence if it was using the vehicle on that occasion for non-agricultural purposes and not as an agricultural tractor.

(3) Section 6 of the Finance Act 1971, was specifically confined to the purposes of sch.3 of the 1971 Act and that was the purpose of the excise licence. Moreover the definition related only to tractors and not to agricultural tractors.

(4) A very large part of the trailer weight was carried on the wheels of the dolly. The court was unable to come to the conclusion that a substantial part of the weight of the trailer was borne by the vehicle.

Appeal by Director of Public Prosecutions by way of case stated against the acquittal by the Avon North justices dismissed in respect of both informations.

Director of Public Prosecutions v. Free's Land Drainage Co. Ltd. Q.B.D.

925

Road traffic - prescribed traffic signal - failing to comply with double white line system - whether preliminary white arrow mandatory - whether necessary for arrow to be repeated at the commencement of every unbroken white line on the side nearest to the approaching vehicle providing there was one at the beginning of a continuous sequence of double white lines - s.22 of the Road Traffic Act 1972 (now s.36 of the Road Traffic Act 1988).

The appellant was convicted on an information that he on May 10, 1988, drove a motor cycle on Western Road, Crewe, but failed to conform with the indication given by a system of double white lines which had lawfully been placed on that road, contrary to s.22 of the Road Traffic Act 1972 (now s.36 of the Road Traffic Act 1988).

Under the system at the time in Western Road, in the direction in which the appellant was travelling, there was first a pair of double solid white lines, preceded by two arrows indicating that the motorist should keep to the left; then the line nearest to him became an intermittent dashed white line, the right hand line remaining solid, and then both lines again became solid without a further arrow indicating to the left.

The appellant overtook in the dashed white line part as he was permitted to do but failed to return to his own side before the double solid white line recommenced.

Held: (1) It was conceded on appeal that the preliminary arrow had to be repeated before every section of continuous white line on the side nearest to the approaching vehicle.

(2) The preliminary arrow requirement was mandatory.

Appeal by the appellant, Andrew Peter O'Halloran, by way of case stated against his conviction by the magistrates for the Division of Crewe and Nantwich allowed and his conviction quashed.

O'Halloran v. Director of Public Prosecutions Q.B.D.

837

Road traffic - road traffic regulation order made under s.6 of the Road Traffic Regulation Act 1984 - control and regulation of traffic movement - additional requirement to fit components to reduce air brake noise emission - whether ultra vires and unlawful because inconsistent with the national framework of the 1984 Act and E.E.C. Directives - London Boroughs Scheme for the Implementation and Enforcement of the Greater London (Restriction of Goods Vehicles) Traffic Order 1985, article 3, permits condition 11.

The Transport Committee for certain London Boroughs made a road traffic order under s.6 of the Road Traffic Regulation Act 1984 with a condition that permits would only be issued to lorries which had fitted to them specified components to reduce air brakes noise emissions.

Held: (1) The provision in the regulation permitting an appeal to the High Court within six weeks from the date on which the order was made did not apply to a matter such as the imposition, long after the order was made, of a condition for the grant of a permit in implementation of the order.

(2) An aggrieved lorry owner was not precluded in any event by such a provision from applying for discretionary relief to the court.

(3) The respondents were not entitled to lay down standards of silencing, involving a technical matter of construction, by insisting upon, as a condition of issuing a permit, the fitment of a silencer and of a prescribed manufacturer. In doing so the respondents usurped the function of the Secretary of State in his control of matters affecting construction and use. The condition was therefore *ultra vires* and unlawful.

(4) The condition was in any event *ultra vires* and unlawful: a ban could not be based on a failure to comply with a technical requirement outside the existing regulations.

(5) Applying *Foster and Others v. British Gas PLC* [1988] 1 C.R. 584 and *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* (1986) 83 L.C.R. 335, the respondent local authorities were emanations of the state and the E.E.C. Directive requirements could be relied on in an action by an individual against the State.

(6) Applying *Dim-Dip Car Lights: E.E.C. Commission v. United Kingdom* (1988) 3 C.M.L.R. 437, where exhaustive E.E.C. Directives had been issued, requirements could not be imposed going beyond them.

Application by the Freight Transport Association Ltd. and others for judicial review granted.

R. v. The London Boroughs Transport Committee, ex parte Freight Transport Association Ltd. (FTA), Road Haulage Association Ltd. (RIHA), Reed Transport Ltd., Wincanton Distribution Services Ltd., Conoco Ltd., Cox Plant Hire London Ltd., Mayhew Ltd. Q.B.D.

773

Road traffic - whether justices entitled to use their local knowledge in considering whether car park is a public place - desirability of disclosing to defence and prosecution their intention of using such knowledge.

The appellant was convicted of driving a motor car on a public place, namely a car park, with excess alcohol in his breath contrary to s.6 of the Road Traffic Act 1972 as amended. The offence was committed in a National Car Park in the early hours of the morning and the issue in the case was whether or not at the time the car park was a public place. Evidence was given by a police constable that he saw the car being driven around the car park, that there were other cars parked there, that the barrier at the entrance to the car park was raised and that the barrier was only put down across the entrance during shopping hours. Two of the justices knew the car park very well, one of them living near to it, and they used, as part of the evidence, their local knowledge that the barrier was up at night and that that was a clear indication to the public to use the car park during the night. They concluded that the appellant was driving his car in a public place. On appeal by way of case stated:

Held (dismissing the appeal): The justices were entitled to use their local knowledge and draw the inferences they did. It must be recognized in cases of this kind which involved local knowledge that justices simply could not turn out of their minds knowledge which they acquired locally, nor was it desirable that they should. It would be wise of justices to make their intention to use such knowledge known to the defence and the prosecution so as to give the advocates an opportunity of commenting upon it. Provided justices took special care to keep within proper bounds the use they made of local knowledge, and informed a defendant especially of that locally acquired knowledge and the use to which they sought to put it, justices acted perfectly properly and rightly.

Appeal: by Robert James Bowman by way of case stated by Portsmouth justices against his conviction under s.6 of the Road Traffic Act 1972 as amended.

Bowman v. Director of Public Prosecutions Q.B.D.

524

SENTENCING

Sentencing - application of rigid formula by justices in imposing fines offends against principles of sentencing.

The applicant pleaded guilty to ten offences of using a goods vehicle with excess weight contrary to s.40(5)(b) of the Road Traffic Act 1972 as amended and the regulations made thereunder. The justices fined him a total of £7,600 to be paid by monthly instalments of £300 if he was in employment and £25 per month if he was unemployed. The fines were calculated according to a formula which the justices were accustomed to apply and which provided for a basic fine of £400 for each offence to which was added a sum of £20 for each 1% by which the overload exceeded the permitted maximum. The applicant's appeal against that sentence was dismissed by the Crown Court. On application for judicial review.

Held: The application of a rigid sentencing formula by justices was wrong and offended against the following three principles of sentencing:

1. The level of the fine should be determined by reference to the gravity of the offence, to the previous record of the offender and to all the circumstances of the case.
2. The amount of the fine should be within the offender's capacity to pay.
3. Where the offender was allowed time to pay by instalments, payment should be recoverable within a reasonable time.

A formula was justifiable as a base, but in each case the justices and the Crown Court had to consider all the circumstances and apply the general principles of sentencing.

In the present case the sentence imposed was truly astonishing and the fines would be reduced to a total of £1,300 payable by monthly instalments of £55.

Application: by Maurice Birchall for judicial review of a decision of the Chelmsford Crown Court dismissing his appeal against sentence imposed by the Freshwell and South Hincford justices.

R. v. Chelmsford Crown Court, ex parte Birchall Q.B.D.

197

Sentencing - co-defendants should be sentenced by the same Judge.

The two appellants were brothers aged 20 years and 17 years respectively. On September 1, 1989, following their pleas of guilty at an earlier hearing before a different Judge, the younger brother was sentenced to a total of five years' detention in a young offender's institution for five offences of burglary with 236 offences taken into consideration, and the older brother was sentenced to a total of three years' detention for five offences of burglary, two of theft and breach of probation with 21 offences taken into consideration. At the earlier hearing on August 25 before a different Judge, a co-defendant (aged 16 years) had been sentenced, following his pleas of guilty to three of the burglary offences, and an attendance centre order made against him, and the cases against the two appellants stood over. The reason for transferring their cases from August 25 to September 1 was apparently one of administrative convenience arising from the large number of offences to be taken into consideration by the younger brother. On appeal against sentence:

Held (dismissing the appeal): Co-defendants appearing together before the court should be sentenced by the same Judge. It was a most undesirable practice for one co-defendant to be sentenced by one Judge and the others to be sentenced later by a different Judge. In the present case, if it was necessary to adjourn the case for administrative reasons, the Judge who dealt with the co-defendant and who was available on the adjourned date, should also have dealt with the appellants.

Appeal: by Martin Forde and Michael Forde against the sentences imposed on them at St. Albans Crown Court.

R. v. Forde and Another C.A. (Crim. Div.)

1020

Sentencing - custodial sentence on young offender involved in multiple offences - proper approach in assessing seriousness of offence under s.1(4) of the Criminal Justice Act 1982.

On August 18, 1988, before s.1(4) of the Criminal Justice Act 1982 was amended by s.123 of the Criminal Justice Act

1988, the appellants Eddy (aged 25) and Monks (then aged under 21 years) pleaded guilty to a number of offences arising out of a series of burglaries and were sentenced to a total of six years' imprisonment and 18 months' youth custody, respectively. The background to the offences was the occurrence prior to those offences of a large number of efficiently organized systematic burglaries of non-domestic premises in which by mid-1987 some £1m. to £1.25m. of goods had been stolen.

As far as Monks was concerned his offending took place over a short period but the total amount involved in the two offences of burglary of which he was convicted and one of the two burglary offences taken into consideration was about £32,000. As he was under 21 years of age the only ground on which the Judge could have imposed a sentence of youth custody was that "the offence was so serious that a non-custodial sentence could not be justified" within s.1(4) of the Criminal Justice Act 1982. His counsel drew the attention of the Judge to that section and submitted that on the authorities as then existed the offences must be considered individually.

Held (in relation to the appeal by Monks): The submission of counsel that the offences must be taken individually was right as the authorities then stood (*R. v. Roberts* (1987) 9 Cr. App. R. (S) 152; [1987] Crim. L.R. 581; and *R. v. Bradbourn* (1985) 7 Cr. App. R. (S) 180). Since sentence in the present case was passed, however, s.1(4) of the Criminal Justice Act 1982 had been amended by s.123 of the Criminal Justice Act 1988 and there had been developments in the case law.

In *R. v. Thompson* (1989) 153 J.P. 593 the court followed the decision in *R. v. Roberts* (*supra*) holding that it was not proper or appropriate to aggregate the totality of the series of the offences together in deciding whether a non-custodial sentence was justified, and made it clear that the decision in *Roberts* applied not only to the original provisions of s.1(4) of the 1982 Act but also to the substituted provisions of s.123 of the 1988 Act. Prior to the judgment in *R. v. Thompson* (*supra*), however, the Court of Appeal dismissed an appeal in the case of *R. v. Hurren* (1989) 153 J.P. 630 for reasons which were given 10 days after the judgment in *Thompson*. In *Hurren* the court held that when sentencing an offender under 21 years of age for multiple offences the court was not required to consider each offence in complete isolation but was entitled to consider the gravity of each offence in the light of all the circumstances, and that *Roberts* did not preclude the court from including among the circumstances the fact that the appellant was a persistent perpetrator of criminal damage, albeit that in other cases charged or taken into consideration the damage was of a trivial nature. It was not, therefore, reaching a conclusion on the aggregate of the offences which was prohibited by *Roberts* and *Thompson*.

In the present case the court endorsed the view taken by the court in *Hurren* and the reasoning which led to it. If it was wrong, the results were so absurd that they could not have been within the Parliamentary intent. Each of the two burglaries charged against the appellant involving £11,500 and £9,500 worth of property and the burglary taken into consideration involving £10,000 of property was so serious that a non-custodial sentence could not be justified, even if viewed in isolation. If, however, that were not so, each offence when viewed in context would certainly be so serious.

Accordingly, the Judge was correct in imposing a custodial sentence, but the sentence imposed was excessive and would be reduced to a total of nine months' youth custody.

Appeals: by Richard James Eddy and Simon Alexander Monks against their sentences imposed at Bristol Crown Court.

R. v. Eddy and Monks C.A. (Crim. Div.)

130

Sentencing - custodial sentence on young offender involved in multiple offences - proper construction of s.1 of the Criminal Justice Act 1982 as amended by s.123 of the Criminal Justice Act 1988.

In this case the Court of Appeal reviewed the decisions in the following cases dealing with the duty imposed on courts when considering the imposition of a custodial sentence on an offender under 21 years of age convicted of multiple offences:

- R. v. Roberts* (1987) 9 Cr. App. R. (S) 152
- R. v. Hassan and Khan* (23.3.89) unreported
- R. v. Thompson* (1989) 153 J.P. 593
- R. v. Hurren* (1989) 153 J.P. 630 and
- R. v. Eddy and Monks* (1990) 154 J.P. 130.

The relevant statutory provisions are set out in s.1 of the Criminal Justice Act 1982 as amended by s.123 of the Criminal Justice Act 1988, as follows:

"(4) A court may not (a) pass a sentence of detention in a young offender institution ... unless it is satisfied (i) that the circumstances, including the nature and gravity of the offence are such that if the offender were aged 21 or over the court would pass a sentence of imprisonment, and (ii) that he qualifies for a custodial sentence.

"(4A) An offender qualifies for a custodial sentence if (a) he has a history of failure to respond to non-custodial

penalties and is unable or unwilling to respond to them; or (b) only a custodial sentence would be adequate to protect the public from serious harm from him; or (c) the offence of which he has been convicted or found guilty was so serious that a non-custodial sentence for it cannot be justified."

The facts of the present case were that the appellant (aged 17 years) pleaded guilty at the Crown Court to eight offences of non-residential burglary and three similar offences were taken into consideration. The total losses amounted to about £500 and damage caused was of a similar amount. In sentencing the appellant and a co-defendant (aged 16) to three months' detention the assistant recorder made no statement in either case that she was satisfied that the offender qualified for a custodial sentence and the reasons for it as required by s.2(4) of the 1982 Act as amended. On appeal against sentence:

Held: 1. The assistant recorder should have satisfied herself that the circumstances were such that if the appellant had been 21 or over she would have passed a sentence of imprisonment and (2) that he qualified for a custodial sentence under one or more of the three paragraphs set out in s.1(4A) (*supra*). She should then have stated in open court that he qualified for a custodial sentence, identified the relevant paragraph and given her reasons.

2. There was no question of criterion (a) or (b) of s.1(4A) *supra* applying to qualify the appellant for a custodial sentence and the court was therefore concerned with para.(c). Only if all the 11 offences committed by the appellant were taken together could it be said that they were so serious that a non-custodial sentence could not be justified and that raised the question whether in applying criterion (c) the court must look at each offence individually or whether it was entitled to aggregate all the offences together.

3. Having reviewed all the relevant cases, the court was satisfied that the law on this matter was correctly stated in *R. v. Hassan and Khan* (*supra*). In a case where a person under 21 was convicted or found guilty of multiple offences the court, in deciding whether under s.1(4A)(c) of the 1982 Act as amended "the offence ... was so serious that a non-custodial sentence for it cannot be justified", must consider each offence individually. The court was not entitled to aggregate the totality of the series of offences in deciding whether a non-custodial sentence was justified.

Per Russell, L.J.:

"Each criterion is mutually exclusive. The court must in each case decide whether one or more than one is satisfied. Each is directed to different aspects of the case. Criterion (a) requires the court to look at the particular offender; (b) is concerned about protecting the public from serious harm from the offender; (c) is concerned about the gravity of each individual offence. Where an offender does not qualify for a custodial sentence under (a) or (b) it is not permissible to aggregate offences under (c) when each does not qualify on its own."

[Note: This case was referred to in the later case of *R. v. Scott (Tracey)* (Times Law Report, January 16, 1990) in which Lord Lane, C.J. said "But it was right to point out that the wording of s.123 [of the Criminal Justice Act 1988] was, surprisingly, such that the court was only entitled to consider the gravity of each individual offence. That was made clear in *R. v. Davison*. It was a matter which ought to have the attention of Parliament as soon as possible. As it stood at present, the court was unable to take matters into consideration on the questions of seriousness which it should take into account."]

Appeal: by Donald John Davison against sentence imposed at Kingston upon Thames Crown Court.

R. v. Davison C.A. (Crim. Div.)

229

Sentencing - custodial sentence on young offender under s.1(4A)(a) of Criminal Justice Act 1982 as amended - meaning of "history of failure to respond to non-custodial penalties ..."

The applicant, aged 20 years, pleaded guilty at the magistrates' court to criminal damage. He had one previous court appearance for a similar offence when a compensation order was made which was still outstanding. Following receipt of a social inquiry report which recommended a probation order or a community service order, sentence was deferred for four months during which the probation officer made considerable efforts on his behalf with scant response from him. He failed to appear at the adjourned sentencing hearing and was later arrested on warrant. After considering an updated social inquiry report in which the earlier recommendation of probation or community service was withdrawn as being unsuitable or inappropriate, the justices committed him to eight weeks' detention in a young offender's institution. His appeal to the Crown Court on the ground that as he was still under 21 years of age he did not qualify for a custodial sentence under s.1(4A)(a) of the Criminal Justice Act 1982, as amended, was dismissed. On application for judicial review:

Held (allowing the appeal): The wording of s.1(4A)(a) of the Criminal Justice Act 1982 as amended by s.123 of the Criminal Justice Act 1988 that "he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them" meant there had to be at least two separate occasions on which a young offender had been

sentenced to and failed to respond to non-custodial penalties. In the present case there was only one previous court appearance when the compensation order was made.

As the applicant had been in custody for three weeks, the court would substitute a conditional discharge for 12 months.

Application: by Robert Ager for judicial review of a decision of Southwark Crown Court dismissing his appeal against a custodial sentence imposed by Clerkenwell justices.

R. v. Southwark Crown Court, ex parte Ager Q.B.D.

833

Sentencing - custodial sentence on young offender - whether offence taken into consideration can be taken into account to satisfy requirements of s.1(4A)(c) of the Criminal Justice Act 1982 as amended.

The appellant pleaded guilty on indictment to one offence of attempted dwelling-house burglary and asked for one offence of dwelling-house burglary committed whilst on bail for that offence to be taken into consideration. He was sentenced to eight months' detention in a young offenders' institution, the Judge taking the view that s.1(4A)(c) of the Criminal Justice Act 1982 as amended applied because the offence of attempted burglary was so serious that a non-custodial sentence for it could not be justified. On appeal against sentence the Court of Appeal ruled that in the circumstances of the case the attempted burglary of which the appellant had been convicted did not constitute a qualifying offence under that section and went on to consider the relevance of the offence taken into consideration.

Held: An offence taken into consideration, whatever its seriousness, did not amount to a conviction under s.1(4A)(c) of the Criminal Justice Act 1982 as amended by s.123 of the Criminal Justice Act 1988, and so could not be treated separately as a qualifying offence thereunder. Moreover, although logically, and as a matter of common sense, the second offence was clearly relevant to the Judge's sentencing task, it could not, on the authority of *R. v. Davison* (1990) 154 J.P. 229, be aggregated with the attempted burglary to satisfy the requirements of s.1(4A)(c).

The appeal was allowed and a probation order for two years substituted.

Per Steyn, J.: "This extraordinary result highlights the need for prosecuting authorities, and those responsible for the drafting of indictments, to consider carefully the implications of [s.1(4A)(c) of the 1982 Act as amended] before taking decisions as to the content of the indictment. It is demonstrably not in the public interest that a Judge's hands should be tied by the coincidence of whether an offence appears on the indictment, or, as in this case, on what is commonly known as the t.i.c. form. After all, the public interest requires fairness to the prosecution as well as the defence."

Appeal: by Lee Joseph Patrick Howard against a custodial sentence imposed on him at Birmingham Crown Court.

R. v. Howard C.A. (Crim. Div.)

973

Sentencing - unlawful prison sentence can be changed or upheld by Court of Appeal.

The appellant who was represented by solicitor and counsel pleaded guilty on indictment to theft, but when he appeared before the court for sentence two days later neither solicitor nor counsel was present. The Judge indicated that he was minded to impose a suspended sentence of imprisonment but would put the case over for counsel to attend if the appellant wished. The appellant said he would like the case dealt with and he was sentenced to three months' imprisonment suspended for two years. On appeal against sentence:

Held (dismissing the appeal): Although under s.21 of the Powers of Criminal Courts Act 1973 it was unlawful, subject to two exceptions relating to legal aid, for a court to pass a sentence of imprisonment on a defendant who had not previously been sentenced to imprisonment and was not legally represented, that unlawfulness could be put right by the Court of Appeal. The court could decide on appeal to change the sentence or, if it considered that the sentence imposed was the only one it was reasonable to pass, it could uphold the sentence. In the present case the court was of opinion that no other sentence than that passed would have been appropriate.

Appeal: by Paul Hollywood against the sentence imposed on him at Knightsbridge Crown Court on conviction of theft.

R. v. Hollywood C.A. (Crim. Div.)

705

SEX ESTABLISHMENTS

Sex establishments - evidential requirements in respect of adoption of scheme of licensing by local authorities - whether necessary to prove sexual stimulation in order to establish that premises are used as a sex encounter establishment - Local Government (Miscellaneous Provisions) Acts 1976 and 1982; Greater London Council (General Powers) Act 1986.

When a local authority is prosecuting in respect of an alleged breach of the system of licensing sex establishments, (a) strict compliance with s.41(1) of the Local Government (Miscellaneous Provisions) Act 1976 is required in order to prove the local authority's adoption of the licensing powers, and more particularly (i) any certified copy of any resolution, order, report or minute produced in evidence by the local authority, must not only bear the signature of the proper officer but must also contain a statement of the office held by the signatory, and (ii) original copies, and not photocopies, of any newspapers containing relevant public notices must be produced in evidence; and (b) where the prosecution alleges the use of premises as a sex encounter establishment, (i.e. "premises at which performances ... are given ... which wholly or mainly comprise sexual stimulation of the persons admitted to the premises ..."), contrary to sch.3A(a) of the Local Government (Miscellaneous Provisions) Act 1982, it is the nature of the performance which is relevant, and not whether the performance has actually produced sexual stimulation.

Appeal by way of case stated.

Smakowski and Another v. Westminster City Council Q.B.D.

345

Sex establishments - meaning of entertainment being "not unlawful" - para.3A(c), sch.3, Local Government (Miscellaneous Provisions) Act 1982.

The appellant's premises were used for the purposes of an entertainment in which naked women exposed their bodies in an indecent manner. A magistrates' court convicted the appellant on the basis that the premises were used as a sex encounter establishment within the meaning of para.3A(c) of sch.3 of the Local Government (Miscellaneous Provisions) Act 1982, while no licence was in force permitting that use. The appellant appealed unsuccessfully to the Crown Court and to the High Court on the basis that para.3A(c) applied only to "... entertainments which are not unlawful ..." and, therefore, could not apply in his case because he was committing the offences of outraging public decency and keeping a disorderly house.

On appeal to the House of Lords,

Held (dismissing the appeal): The appellant had been rightly convicted because (a) the purpose of the provision was to require the licensing of premises where live nude entertainment was provided; and (b) the words "which are not unlawful" should be regarded as mere surplusage, having been introduced by incompetent draftsmanship for no other purpose than to emphasize what para.1 of the schedule made clear in any event, namely that the grant of a licence under the 1982 Act would not render lawful any activities which were unlawful irrespective of the scheme of licensing introduced by the Act.

Appeal against a decision of a Divisional Court of the Queen's Bench Division of the High Court.

McMonagle v. Westminster City Council H.L.

854

THEFT

Obtaining exemption or abatement of liability by deception under Theft Act 1978, s.2(1)(c) - whether relevant if act is one of omission and not commission - whether liability to pay must exist at time of deception.

The appellant, a consultant gynaecologist/obstetrician, was head of a N.H.S. department and was also in private practice. At the three stages of pregnancy - ante-natal, confinement and post-natal - treatment was either free under the N.H.S. scheme or paid for privately in the case of private patients. The appellant was accused of abusing the system either for his own or his private patients' benefit. Counts 4 and 5 related to ante-natal patients and alleged evasion of liability by deception by falsely representing that named patients were being treated by him on the N.H.S. and that no charge should be made for ante-natal tests done by the pathology department, thus dishonestly obtaining exemption

from liability to pay for the tests. Counts 6 and 7 related to hospital treatment alleging false representations that named patients were being treated on the N.H.S. and not privately, whereby he dishonestly obtained exemption from liability to pay for the in-patient treatment they had received. The prosecution alleged that by failing dishonestly to inform the hospital of the private patient status of the women, he had caused either himself or them not to be billed for the services they had received. The appellant was convicted on the four counts and acquitted on others.

He appealed on the grounds, *inter alia*, (1) that the recorder had erred in rejecting a submission that "counts 4-7 were wrongly laid in law in that the allegation to be proved required proof of acts of commission, whereas the evidence disclosed only acts of omission" and (2) that the words "legally enforceable" in s.2(1)(c) of the Theft Act 1978 meant that the prosecution had to establish an existing liability at the time of the alleged deception, and that if the deception was practised before the liability to pay had come into existence then no offence was committed.

Held (dismissing the appeal): 1. If, as was alleged, it was incumbent upon the appellant to give the relevant information to the hospital and he deliberately and dishonestly refrained from doing so with the result that no charge was levied either upon his patients or himself, the wording of s.2(1)(c) of the Theft Act 1978 was satisfied, and it mattered not whether it was an act of commission or omission.

2. An offence under s.2(1)(c) of the Act could be committed before any liability to pay came into existence, for whereas in s.2(1)(a) and 2(1)(b) the words "existing liability" were to be found, in s.2(1)(c) the word "existing" was absent. The wording of s.2(1)(c) was apt to cover an expected or future liability even if the alleged deception was not in truth a continuing one.

Appeal: by Peter Stanley Firth against his conviction by Worthing Crown Court of four offences under s.2(1)(c) of the Theft Act 1978.

R. v. Firth C.A. (Crim. Div.)

576

TOWN AND COUNTRY PLANNING

Town and country planning - offences contrary to tree preservation orders - burden of proving tree to have been dying etc. - ss.60 and 102, Town and Country Planning Act 1971.

Where a defendant in a prosecution for contravention of a tree preservation order, under s.102 of the Town and Country Planning Act 1971, claims to be entitled to an acquittal on the basis of s.60(6) of the Act, namely that the tree was dying, dead or dangerous, or that his action was necessary for the abatement or prevention of a nuisance, the onus of proving that he comes within s.60(6) lies on him, because s.60(6) is a free-standing provision, creating an exception from the criminal liability imposed by s.102, rather than creating negative elements of the offence, in respect of which the burden of proof would be on the prosecution.

Appeals against conviction at the Crown Court sitting at St. Albans (Mr. Recorder Zucker, Q.C. and a jury).

R. v. Alath Construction Ltd and Another C.A.

911

Procedure - whether matters of public law can be raised other than by way of application for judicial review.

Town and country planning - relationship between waste land notices and enforcement notices, ss.65, 87-88, 104-107 and 243, Town and Country Planning Act 1971.

The second respondent, as local planning authority, served a notice on the applicant under s.65 of the Town and Country Planning Act 1971, requiring him to tidy up certain land. The applicant appealed against this notice to the magistrates' court. The magistrates upheld the notice. The applicant then appealed to the Crown Court where he wished to argue that, in the circumstances of the case, the notice had been *ultra vires* the second respondent, who should have taken enforcement action under other provisions of the 1971 Act. The Crown Court ruled that it had no jurisdiction to deal with the *vires* argument, and upheld the s.65 notice, subject only to variation as to the time limit allowed for compliance.

On an application for judicial review,

Held (allowing the application in part): (1) The decision of the Court of Appeal in *Britt v. Buckinghamshire County Council* (1963) 127 J.P. 289; [1964] 1 Q.B. 77, which had not been cited in the Crown Court, was binding on the court and clearly indicated that the s.65 notice had been *ultra vires* the second respondent. (2) However, on the present facts it could not be said that raising the *vires* argument was an abuse of the process of the court within the doctrine of *O'Reilly*

v. *Mackman* [1983] 2 A.C. 237, and therefore the Crown Court had been wrong to refuse to consider it.

[Note: the case of *R. v. South Somerset District Council, ex parte DJB (Group) Limited*, referred to in the judgment as being unreported, is reported at (1989) 1 Admin. L.R. 11.]

Application for judicial review.

R. v. Oxford Crown Court and Another, ex parte Smith Q.B.D.

422

TRADE DESCRIPTIONS ACTS

Clocked mileometer - whether defendants had taken all reasonable precautions and exercised all due diligence to prevent offence - ss.1(1)(b) and 24 of the Trade Descriptions Act 1968.

The respondents were charged under s.1(1)(b) of the Trade Descriptions Act 1968 with supplying a motor vehicle to which a false trade description was applied, namely, that the mileage was 13,800 when it was in fact in the region of 37,000. The respondents sought to rely on the statutory defence in s.24 of the Act, by satisfying the "reasonable precautions" and "all due diligence" tests. The vehicle was sold to the respondents by a Mr. Reid, who said that the car was his father's who had just died. He was unable to produce the registration document at that time. The respondents' sales manager examined the vehicle and honestly believed that its condition corresponded with the mileage shown on the mileometer (13,800). Mr. Reid signed at the request of the respondents a form verifying the mileage as correct. The respondents' normal policy was stated to be that they would check the mileage with previous owners also but they did not do so on this occasion, notwithstanding the fact that when they did receive the registration document it revealed more than two previous owners. The justices accepted that the statutory defence had been made out on the facts. On appeal by way of case stated:

Held: That the appeal would be allowed. It was incumbent upon the respondents given their normal stated policy on such matters, to take reasonable steps to ensure that the policy was followed by employees. They had failed to establish that such steps had been taken nor had they proved that any special features in this case took it outside their normal policy of checking with previous owners. The case would be remitted to the justices with a direction to convict the respondents on the information.

Horner v. Sherwoods of Darlington Limited Q.B.D.

299

False label on goods - whether reasonable precautions and all due diligence exercised in absence of any steps taken by defendant - ss.1(1)(b) and 24 - Trade Descriptions Act 1968 and Common Agricultural Policy (Wine) Regulations 1987.

Bottles of wine sold by the defendant were inaccurately labelled as being 8% alcohol strength when the true figure was 7.2%. Informations were laid against the defendant under s.1(1)(b) Trade Descriptions Act 1968 and the Common Agricultural Policy (Wine) Regulations 1987. The defendant sought to rely on the statutory defence in s.24(1) of the 1968 Act and its equivalent in the 1987 Regulations. The evidence showed that the defendant did not carry out any tests or analysis of the alcoholic strength whether on a random basis or not and relied solely on the tests carried out by the producers in Germany. The justices accepted that the statutory defence was made out and dismissed the informations. On appeal:

Held: The question to be asked is whether a risk that an event such as happened might occur was sufficiently large to demand that a small local dealer should carry out sampling, bearing in mind the expense, nature of analysis and the vast number of lines supplied by the defendant. The answer given by the justices was a reasonable one. The appeal would be dismissed.

Hurley v. Martinez & Co. Ltd. Q.B.D.

821

Trade description - false statement concerning authorship of painting - whether a trade description - whether auctioneers within scope of Trade Descriptions Act 1968 - disclaimer in auction catalogue - whether effective - delay - s.1(1)(a) Trade Descriptions Act 1968.

The respondent was charged under s.1(1)(a) of the Trade Descriptions Act 1968 that he in the course of trade or

business did apply to a water colour painting a false trade description by means of an entry in his auction catalogue to the effect that the painting was by J.M.W. Turner, R.A. The picture was bought at an auction by a consumer who had read the catalogue. It was subsequently discovered by the consumer that it was not by Turner, but that the respondent was of the opinion throughout that it was not by Turner. There was a comprehensive form of disclaimer at the front of the catalogue. The justices, whilst accepting that the 1968 Act applied to works of art, nonetheless acquitted the respondent, apparently on a number of grounds. The disclaimer was sufficiently bold, precise and compelling so as to constitute a defence. The respondent was merely an agent for the seller and that there had been an oppressive delay in bringing the prosecution, were the three reasons given.

Held: (1) It was quite clear that the Trade Descriptions Act 1968 applied to auctioneers (*Aitchison v. Reith and Anderson (Dingwall and Tain) Ltd.* [1974] Sc.L.T. 282 considered).

(2) The 1968 Act also applied to the art world.

(3) The disclaimer was ineffective to a charge under s.1(1)(a) (*Newman and Others v. Hackney London Borough Council* [1982] R.T.R. 296 and *R. v. Southwood* (1987) 151 J.P. 860; [1987] R.T.R. 273 applied).

(4) That the issue of delay should not have been allowed to sway the justices in coming to their decision.

The appeal would be allowed. No order as to costs.

May v. Vincent Q.B.D.

997

Use of registered trademark on goods other than those of registered user - logo incorporating trademark on front of sweatshirts - in other respects items different - whether false to a material degree - ss.1, 2 and 3(1) of the Trade Descriptions Act 1968.

The respondent company was charged with two offences contrary to s.1(1)(b) of the Trade Descriptions Act 1968, in that it offered to supply two sweatshirts to which a false trade description had been applied, namely, the words in a particular form "Marc O Polo". This was the registered trademark of another company. The evidence showed that the offending sweatshirts had this logo on the front and they were on a separate shelf next to genuine Marc O Polo sweatshirts, but they were different in a number of respects from the genuine article, in particular, they were of a different style and composition and had a different neck label. The justices dismissed the informations on the basis that the descriptions were not false to a material degree, that the average shopper would not have been misled. On appeal:

Held: That whilst the justices had been correct to try to put themselves in the position of the average shopper and consider the description of the goods as a whole, they had failed to give proper effect to the prominence of the trademark on the shirts. It was wrong for them to have taken into account the fact that the shirts were displayed on a separate shelf. This was a decision no reasonable bench could have reached. The case would be remitted with a direction to convict on both informations.

Durham Trading Standards v. Kingsley Clothing Limited Q.B.D.

124

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ACTING DIRECTOR: ROSEMARY KEENAN



FAMILY CENTRES:
Promoting family life
in the Catholic community

SCHOOL COUNSELLING:
Pastoral care for children
in Catholic schools



HOMELESS FAMILIES:
Work with families in bed
and breakfast hotels

ADOPTION AND FOSTERING:
Providing alternative Catholic
families for children in need

*'Refuse no one the good on which he has
a claim, when it is in your power to do it
for him ... Proverbs 3:27*

The problems which affect children today are well known. Homelessness, child abuse, poverty, but above all the breakdown of the family unit. We aim to prevent such problems through our Family Centres, our School Counselling and our work with homeless children. But when prevention fails we seek the cure of providing alternative families through Adoption and Fostering. And not just infants but, through our Special Needs Homefinders, for those children who are harder to place but who need just as much love and even more care.

**Please support this essential work with Catholic children and their families.
We depend entirely upon voluntary contributions.**

When making your Will please remember us.

I wish to support the work of the Catholic Children's Society.

Please accept my donation of £10 ☐ £20 ☐ £50 ☐ Other £

Please make cheques/postal orders payable to Catholic Children's Society.

(Please tick if receipt is required ☐)

Name:

Address:

Return to: Catholic Children's Society (Westminster),
73 St Charles Square, London W10 6EJ.

APPROVED ADOPTION AGENCY FOR THE DIOCESES OF WESTMINSTER AND BRENTWOOD

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SO MUCH STILL TO BE DONE

for the hundreds of elderly people from all parts of the country — lonely, living in distressing circumstances — who are waiting and hoping that we can accommodate them soon in self-contained flatlets of their own.

Time for them is running out fast!

We have the skill, experience and desire to provide still more self-contained flatlets, where the elderly can live independent, secure and comfortable lives.

But tomorrow may be too late. We need your help now. Only the unceasing flow of legacies, gifts and covenants will enable us to continue to provide this vital housing need.

**PLEASE REMEMBER US AND THE
ELDERLY IN YOUR WILL**

The Secretary (J.P.),
FELLOWSHIP HOUSES TRUST,
Clock House, Byfleet,
Weybridge, Surrey.
Telephone: Byfleet 43172



Reg. Charity No:— 205786

Reg. Housing Association No. L.1821

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JUSTICE OF THE PEACE REPORTS

R. v. Keenan - Page 68, line C5

recorder erred in assuming (as it appeared) that any unfairness resulting from the admission of the two statements could be cured by the appellant going into the witness box on the following grounds:

R. v. Eddy and Monks - Page 131, line G6

appeals were on June 15 allowed by this court for reasons to be given at a later date. The sentences were quashed and replaced, in the case of Eddy by a sentence of two years' imprisonment and in the case of Monks, by a sentence of nine months' youth custody.

R. v. Matthews and Others - Page 181, line E4

C.J., said in *Delaney* (at p.5B): 'It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Code of Practice'.

R. v. Davison - Page 235, line B6

(c), (at p.634), as follows:

R. v. Bow Street Stipendiary Magistrate, ex parte Director of Public Prosecutions - Page 241, line C5

"In *R. v. Colwyn Justices, ex parte D.P.P.* (1988)* in which the facts are much closer to this case, the delay was less than the present case. The same question was considered by the Divisional Court. The court found that it was impossible for there to be a fair trial. There had been an inordinate delay, regardless of excuse, such as to make a fair trial impossible.

R. v. Bow Street Stipendiary Magistrate, ex parte Director of Public Prosecutions - Footnote

*The case of *R. v. Colwyn Justices, ex parte D.P.P.* (1988) is now reported at (1990) 154 J.P. 989.

R. v. Strickland (E.A.) and Strickland (S.) - Page 437, line A6

recorder in sentencing them stated:

R. v. Mearns - Page 450, line F5

"A person is guilty of an offence if he -

Denny v. Director of Public Prosecutions - Page 460, line B2

March 9, 1989

JUSTICE OF THE PEACE REPORTS

R. v. Swansea Justices and Davies, ex parte Director of Public Prosecutions and R. v. Swansea Justices and Phillips, ex parte Director of Public Prosecutions - Page 710, line C7

to the present conflicting case law, the court would have had power to quash the two acquittals and direct re-trials had it wished to do so.

R. v. Swansea Justices and Davies, ex parte Director of Public Prosecutions and R. v. Swansea Justices and Phillips, ex parte Director of Public Prosecutions - Page 710, line F3

November 22, 1988 the respondent, Davies, was arrested and

R. v. Burke - Page 801, line G5

directed the jury as a matter of law whether in those circumstances there was an implied term of the contract between the appellant and Mr. Nelson that he should be provided with a replacement key, presumably at his own expense, or possibly that he should have been given the opportunity to have a new key cut. Then, having decided as a matter of law whether the conduct charged amounted to a breach of express or implied term of contract, the jury should have been directed to acquit or convict on that count on the basis of that decision. We reject that submission without hesitation ... It is not supported by the wording of s.1(3)."

R. v. Acton Justices, ex parte McMullen and Others and R. v. Tower Bridge Magistrates' Court, ex parte Lawlor - Page 901, line F7

the same. On applications for judicial review:

R. v. Acton Justices, ex parte McMullen and Others and R. v. Tower Bridge Magistrates' Court, ex parte Lawlor - Page 903, line G6

(b) the criminal division of the Court of Appeal; or

R. v. Parmenter - Page 947, line C6

341, *Lawrence* [1982] A.C. 510, and *Seymour* [1983] 2 A.C. 493. After reviewing these authorities the court, in a judgment delivered by McCowan, L.J., concluded that (i) *Venna* had established that the *Cunningham* (i.e. subjective) type of recklessness furnished the test for ss.20 and 47 alike; (ii) *Venna* was still good law. The court went on to reject an alternative argument advanced by counsel for the Crown as follows:

4

JUSTICE OF THE PEACE REPORTS

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 7, line E1**

reversed merely by re-examining the case afresh on the same material."

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 7, line F5**

quite separately, but in addition a great deal more information

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 9, line B3**

very difficult to say that a trial has not begun when a plea has

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 9, line F7**

evidence of his guilt, thus a trial on indictment would be prejudiced.

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 10, line D6**

told me ... that he could not recall being invited to make representations."

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 11, line A4**

to this and addressed the court indicating that she thought the

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 12, line B1**

examining justices. If it appears to the court, having regard to any representations made, that the offence is after all more suitable for summary trial, then they can proceed to deal with the case summarily. This situation, as it seems to me, can only arise when the hearing has proceeded far enough for there to be material from which a proper conclusion can be drawn.

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 12, line D7**

matter were now to proceed to trial on indictment at the Crown

**JUSTICE OF THE PEACE REPORTS
CORRECTIONS (1990) 154**

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 1, line F7**

670; [1986] 1 W.L.R. 939). However, if that power existed at all, it could

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 2, line G3**

and the other summonses were triable only summarily. Subsection (2) reads:

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 3, line E4**

circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other."

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 4, line E7**

no jurisdiction to vary or overrule the earlier decision of the justices in a differently constituted court on the basis that the power under which the mode of trial could be altered was contained by the provisions of s.25 of the Magistrates' Courts Act 1980.

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 6, line C2**

for the proposition that the only power to vary an order as to mode of trial is contained within the framework of s.25 is afforded by the case of *R. v. St. Helens Magistrates' Court, ex parte Critchley* (1988) 152 J.P. 102; [1988] C.L.R. 311. The facts as set out in that short report were that the applicant had been arrested and charged with three offences of criminal damage. In September 1986 the applicant appeared before the justices on those three charges. The parties agreed that summary trial was appropriate. He pleaded guilty to one charge and not guilty to two others. The case was adjourned for trial on those charges.

**R. v. Liverpool Justices, ex parte Crown Prosecution Service -
Page 7, line D5**

earlier hearing? In my judgment the whole scheme of the Act

ARTICLE ORIGINAL ARTICLES

THE EFFECT OF THE INFLUENZA VIRUS ON THE RESPIRATORY SYSTEM

BY DR. J. H. HAY, M.D., AND DR. W. C. KENDRICK, M.D.

From the Department of Pathology, University of Chicago, Chicago, Ill.

(Received for publication, February 1, 1919.)

THE INFLUENZA VIRUS, since its discovery by Smith and

Wright in 1933, has been the subject of much investigation

and has been shown to be the cause of the disease.

The purpose of this paper is to report the results of

experiments conducted in the laboratory of the University of

Chicago, during the winter of 1918-1919.

The experiments were conducted in the following manner:

1. The virus was obtained from the nasal secretions of

patients suffering from influenza.

2. The virus was inoculated into the nasal cavities of

healthy subjects.

3. The results of the experiments were observed by

JUSTICE OF THE PEACE REPORTS

Murphy v. Director of Public Prosecutions - Page 469, line B1

J.P. 264; (1986) Cr. App. R. 228 and the *Practice Note* of this court of December 19, 1986 reported in (1987) 84 Cr. App. R. 137. It is supported by Mr. Alun Jones, Q.C. on behalf of the respondent.

Murphy v. Director of Public Prosecutions - Page 473, line F4

under the Bail Act to a magistrates' court. This observation was in my view clearly an *obiter dictum*.

R. v. Brentwood Justices, ex parte Nicholls - Page 487, line F6

the solicitor for W making no representations on that issue. The justices

R. v. Brentwood Justices, ex parte Nicholls - Page 489, line D1

suitable for the offence to be tried in one way rather than the other.

R. v. Brentwood Justices, ex parte Nicholls - Page 490, line C2

as examining justices, then, if at any time during the inquiry it appears

R. v. Laming - Page 503, line B2

"2(1) Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly:

R. v. Laming - Page 503, line C5

said requirements have been complied with he may on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly."

R. v. Marylebone Magistrates' Court, ex parte Gatting and Emburey - Page 550, line E5

(c) that his conduct was reasonable."

R. v. McCay - Page 621, line D7

anyone on the parade and the witness who was invited to make his

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